IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, et al,
Petitioners,

v.

RONALD G. BRADLEY, et al,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONERS

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 540 F2d 229 and is reprinted in the Appendix to Petition for Writ of Certiorari at pp 151a-190a.[1]

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[1] Hereafter, references to the appendices, the record and the exhibits will be enclosed in parentheses and indicated as follows:

Appendix to Petition for Writ of Certiorari, "PA" followed by the page number, e.g., (PA 12a).

Appendix, "A" followed by the volume number and the page number, e.g., (A 12).

Record of the remedy hearings covering the period from April 29, 1975 to June 27, 1975, "R" followed by the volume number and the page number, e.g., (R I 12).

Record of other proceedings, "R" followed by the date of the proceedings and the page number, e.g., (R Dec 1, 1975, 12).

Exhibits, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education, and F for Detroit Federation of Teachers, followed by an "X" and the number of the exhibit, e.g., (MX 1).

Other opinions delivered in the Courts below are:

United States District Court for the Eastern District of Michigan, Southern Division

May 21, 1975, Order for Acquisition of Transportation, not reported. (PA 1a-2a).

August 14, 1976, Memorandum, Opinion and Remedial Decree (Findings of Fact and Conclusion of Law), 402 F Supp 1096. (PA 7a-88a).

August 15, 1975, Partial Judgment and Order, not reported. (PA 89a-101a).

November 4, 1975, Memorandum and Order [Desegregation Plan], 411 F Supp 943. (PA 103a-111a).

November 20, 1975, Order [Desegregation Plan], not reported. (PA 113a).

May 11, 1976, Memorandum, Order, and Judgment [Educational Components], not reported. (PA 115a-144a).

May 11, 1976, Judgment [Educational Components], not reported. (PA 145a-149a).

United States Court of Appeals for the Sixth Circuit

June 19, 1975, Order [Acquisition of Transportation], 519 F2d 679. (PA 3a-6a).

August 4, 1976, Notice of Entry of Judgment, not reported. (PA 191a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 4, 1976. (PA 191a). The petition for writ of certiorari was filed on September 28, 1976, and was granted on November 15, 1976. The jurisdiction of the Court rests on 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article X—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XI—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Whether, in the absence of any finding of a constitutional violation with respect to educational programs in the Detroit school system, the lower courts exceeded the limits of their authority in the remedy proceedings of this school desegregation case by ordering a system-wide expansion of existing educational programs in the Detroit schools?

II.

Whether, in the absence of any finding of a constitutional violation with respect to Michigan's system of financing public education, the lower courts' decisions compelling defendants in the executive branch of state government to pay out 5.8 million dollars, or more, in additional, unappropriated funds from the State Treasury to defray the costs of court ordered educational program expansion in the Detroit school system are contrary to the Constitution and the decisions of this Court?

STATEMENT OF THE CASE

In *Milliken* v *Bradley*, 418 US 717 (1974), reversing and remanding 484 F2d 215 (CA6, 1973), the Court answered in the negative the question of "whether a federal court may impose a multi-district, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, [and] absent any finding that the included districts committed acts which effected segregation within the other districts . . . ." 418 US at 721.

In that opinion the Court defined the constitutional rights of the plaintiffs as follows:

> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." 418 US at 746

The Court concluded its opinion by saying:

> "Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to *eliminating the segregation found to exist* in Detroit city schools . . . ." (emphasis added) 418 US at 753

The segregation found to exist was the separation of pupils on the basis of race in the Detroit city schools. See, e.g., 418 US at 725-728.

Upon receipt of the Court's mandate from the Court of Appeals, the District Court[2] ordered the plaintiffs and the Detroit Board to submit desegregation plans and ordered the State Board to submit a critique of the Detroit Board's plan.[3] (PA 13a). The plan filed by the Detroit Board included 13 "edu-

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[2] Honorable Robert E. DeMascio to whom the case was assigned after the death of Honorable Stephen J. Roth on July 11, 1974. (PA 155a).

[3] Petitioners Milliken, et al, defendants below, will be called collectively, "Milliken, et al," and individually by the title of their offices, i.e., "Governor," "State Board," etc.; respondents Bradley, et al, plaintiffs below, will be called "plaintiffs"; respondent Board of Education of the School District of the City of Detroit, defendant below, will be called "Detroit Board," and the Detroit Federation of Teachers, Local 231, intervenor below, will be called "Federation." The other school districts that were parties to *Milliken* v *Bradley, supra*, were not parties to the proceedings "directed to eliminating the segregation found to exist in Detroit city schools" and are not parties to this appeal. (R I 5-6).

cational components" that carried a price tag of $35,787,691.00. (Detroit Board's plan, p 15; State Board's critique, p 37). On May 6, 1975, during the course of the remedy hearings, the Detroit Board filed a revised desegregation plan carrying a total price tag for the "educational components" of $29,764,891.00.[4] In its plan, the Detroit Board of Education demanded that the money to defray the cost of the components (the expansion of existing educational programs) "must come from the State defendants", by the payment of funds in addition to moneys then appropriated, or to be appropriated in the future, as state school aid to the Detroit Board.

In its Memorandum Opinion and Remedial Decree of August 15, 1975, the District Court characterized the Detroit Board's plan as follows:

> "The plan . . . contained many components that were vague or poorly documented. Costs for these components, including transportation, were excessive. The defendant Detroit Board sought to add 3,416 new employees, many at salaries well in excess of those paid to its more experienced and tenured teachers. Moreover, the plan failed to inform the court of the extent to which each of the components might presently exist in the school system. . . ." (PA 13a).

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[4]

Three of the "educational components," in-service training, guidance and counseling and testing, involved in this appeal, were priced at an additional cost of $15,730,301.00 in the Detroit Board's original desegregation plan and at an additional cost of $11,713,047.00 in the Detroit Board's revised plan. The reading component ordered by the District Court in its May 11, 1976, Memorandum, Order and Judgment (PA 115a) and its May 11, 1976, Judgment (PA 145a) was not a part of the Detroit Board's plan, either original or revised, and thus carried no price in the Detroit Board's plan.

Plaintiffs' plan, dealing solely with pupil reassignment, did not contain any educational components. Plaintiffs' expert witness on school segregation and desegregation, who prepared the plan, testified that in his opinion the plan, if implemented, would comply with the Court's mandate to eliminate the segregation found to exist in Detroit city schools, *Milliken* v *Bradley, supra,* 418 US at 753. (A 58).

In its Memorandum Opinion and Remedial Decree of August 15, 1975, the District Court characterized plaintiffs' desegregation plan as follows:

> ". . . The plan . . . deals solely with pupil reassignment. The rationale and the ultimate goal of the plan are that, as far as possible, every school within the district must reflect the racial ratio of the school district as a whole within the limits of 15 percentage points in either direction. . . ." (PA 24a).

Plaintiffs' plan was consistent, at least, with the theory of their complaint.[5] As the Court noted in *Milliken* v *Bradley, supra,* 418 US at 723:

> ". . . The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the

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[5]

Although plaintiffs have filed with the District Court amended complaints alleging claims for multi-district relief, see *Bradley* v *Milliken,* 411 F Supp 937 (ED Mich, 1975), the original prayer for Detroit-only relief has never been amended. The Court's comment in *Milliken* v *Bradley, supra,* 418 US at 752 n 24, is particularly appropriate, *viz*: "Apparently, when the District Court, *sua sponte,* abruptly altered the theory of the case . . ., neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory."

implementation of a plan that would eliminate 'the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary, nonracial school system.'"

Hearings on the desegregation plans commenced on April 29, 1975 and concluded with the final arguments of counsel on June 26-27, 1975. During the course of the hearings, on motion of the plaintiffs, the District Court, on May 21, 1975, entered an order requiring Milliken, et al, at their cost, no later than May 28, 1975, to acquire 150 school buses "to be used in the Detroit Desegregation Plan to be implemented by order of the court." (PA 1a). On the appeal of Milliken, et al, the Court of Appeals modified the District Court's Order by requiring that the acquisition be made by the Detroit Board and that Milliken, et al, pay or reimburse the cost of acquisition to the extent of 75%.[6] (PA 5a). The Detroit Board's petition for a writ of certiorari to review the Court of Appeal's Order was denied. 423 US 930 (1975).

On August 15, 1975, the District Court filed its Memorandum Opinion and Remedial Decree (PA 7a), and its Partial Judgment and Order (PA 89a). With respect to pupil reassignment, the District Court rejected the plans submitted by plaintiffs and

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[6]

In that opinion, the Court of Appeals stated that the "modification is based upon the representations . . . made by the State defendants and is consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan." (PA 4a). As the Court recognized in *Milliken v Bradley*, 418 US at 742 n 20, the plenary power to acquire transportation and to transport under Michigan law is vested in the local school district, i.e., the Detroit Board. Under the provisions of the state school aid act, 1972 PA 258, § 71, as amended by 1975 PA 261; MCLA 388.1171; MSA 15.1919(571), local school districts are reimbursed from legislative appropriations in an amount not to exceed 75% of the actual cost of transportation, including the acquisition of the motor vehicle.

the Detroit Board, and ordered the Detroit Board and its staff "in cooperation with the court's appointed experts" to prepare a revised desegregation plan, "which plan shall incorporate the guidelines contained in Section V 'Remedial Guidelines' of the court's Memorandum Opinion." (PA 89a).

Although expressly noting that the plan submitted by the Detroit Board did not distinguish between those components that were necessary to the successful implementation of a desegregation plan and those that were not (PA 35a), nevertheless, the District Court deemed it essential to mandate twelve of the thirteen components included in the Detroit Board's plan and added one of its own, comprehensive reading. (PA 36a-37a, PA 72a-83a).

Notwithstanding the affirmative holding that the Detroit schools were not *de jure* segregated with respect to faculty and staff, *Bradley* v *Milliken*, 338 F Supp 582, 589-591 (ED Mich, 1971) (Roth, J.), *aff'd* 484 F2d 215 (CA 6, 1973), the District Court in effect reserved its ruling on faculty reassignment, opining as to "the necessity of having a proper racial mix among the teaching staff of the school district." (PA 43a). By Order dated August 28, 1975, the District Court directed that "teachers in the Detroit School System shall be reassigned insofar as necessary . . . to achieve a distribution of not more than 70% of teachers of one race in each school." (PA 180a-181a). The Court of Appeals vacated the August 28, 1975 Order and remanded for the hearing of evidence on the issue of faculty assignment, but it affirmed the authority of the District Court "as an equitable remedy to order the reassignment of faculty." (PA 182a).

The District Court's Partial Judgment and Order of August 15, 1975 (PA 89a), was a parallel to its Memorandum Opinion and Remedial Decree. Insofar as it relates to this appeal, the

Partial Judgment and Order directed the Detroit Board and the State Board to formulate and devise a comprehensive testing program in the Detroit school system (PA 95a), and directed the Detroit Board to institute comprehensive programs for in-service training, counseling and career guidance, testing, (PA 95a), and a "comprehensive instructional program for teaching reading and communication skills" in every school in the system. (PA 92a).

Pursuant to the Partial Judgment and Order, the Detroit Board submitted a revised desegregation plan on September 19, 1975, and a revision thereof on October 21, 1975. (PA 104a). By a Memorandum and Order dated November 4, 1975, the District Court ordered the Detroit Board to implement the desegregation plan on or before the beginning of the winter semester, 1976. (PA 109a). By a Judgment entered on November 20, 1975, the District Court, inter alia, confirmed the November 4, 1975, Memorandum and Order. (PA 113a).

In broad outline, the plan adopted by the District Court required the reassignment of 27,524 students, of whom 21,853 would require bus transportation. The plan changed the racial balance in 105 schools out of approximately 300 zoned schools in the system (PA 161a). An additional 100 buses were ordered to be acquired and paid for on the same basis as the initial 150 buses. (Id). The desegregation plan was effectuated by the Detroit Board at the beginning of the second semester, January, 1976, without untoward incident. (PA 162a).

While the plan for school desegregation was processed the parties responded in compliance with the Partial Judgment and Order of August 15, 1975, by filing the requisite submissions with respect to those educational components that are the subject matter of this appeal, to wit: reading and communication skills, in-service training, testing, and

counseling and career guidance.[7] At various times, the District Court entered orders approving the submissions and ordering their implementation.

On May 11, 1976, while appeals were pending in the Court of Appeals by plaintiffs, the Detroit Board and the intervenor Federation from the August 14, 1975, Partial Judgment and Order and other Orders subsequently entered based on the August 15, 1975 Memorandum Opinion (PA 7a), the District Court filed a Memorandum, Order, and Judgment (PA 115a) and entered "our final judgment in this matter." (PA 116a, 145a). Insofar as it relates to this appeal, the Judgment ordered into effect in the Detroit school system on or before the September, 1976 school term expanded "comprehensive programs for: a) Reading and communications skills, b) In-service training, c) Testing, [and] d) Counseling and career guidance," and ordered petitioners Milliken, et al, to defray one-half of the added cost of such expanded programs by the payment to the Detroit Board of additional, unappropriated funds from the State Treasury.[8] (PA 146a-147a).

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[7]

The reading and communication skills, in-service training and counseling and career guidance submissions were filed by the Detroit Board. The testing submission was a joint effort by the Detroit Board and the State Board. No hearings were held with respect to any of these submissions, or their implementation, except that the District Court conferred with counsel and other representatives of the parties on March 12, 1976. No stenographic record was made of that conference.

[8]

Although this appeal is concerned solely with these four so-called educational components, a fifth "component," vocational education centers, requires some explanation because of the District Court's reference thereto in the Memorandum, Order and Judgment of May 11, 1976. (PA 117a-119a). The District Court attempted to equate the vocational education centers with the four components. There is no relationship. For a number of years, the State Board has urged the Detroit Board to establish vocational education centers. The federal vocational education funds that the State Board agreed by its adopted motion and by stipula-

Pursuant to the Judgment (PA 146a-147a), the Detroit Board submitted to the State Board "it's highest budget allocated in any year for each of these above-enumerated quality education programs" and computed "the excess cost in addition thereto occasioned by the specific implementation of the [four] court-ordered programs." The highest budget allocated for each of the four components was in the 1975-76 school year and in that year the Detroit Board's budget allocations were as follows:

Reading	$63,427,000
In-Service	715,000
Testing	1,440,000
Counseling	10,407,000
Total	$75,989,000

tion to allocate to the Detroit Board were the funds available to the State Board for allocation on a 50% matching basis to school districts under state and federal law and the state plan for vocational education. See the Vocational Education Act of 1963; 77 Stat 403 *et seq*, as amended; 20 USC 1241 *et seq*. These funds would have been available to the Detroit Board if it had gone forward with a plan for vocational education centers and had made application therefor. The Detroit Board had received substantial amounts of federal vocational education construction funds in the past when it had made application therefor.

The stipulation, paragraph 3 (PA 140a), expressly recites that state and federal statutes, rules and regulations will control the implementation of the Boards' adopted motions and that title to the centers, paragraph 5 (PA 140a), will be vested in the Detroit Board. In short, the vocational education centers are the antithesis of the four components. The establishment of the centers, pursuant to the stipulation is consistent with state laws, the plenary power of the Detroit Board and the deeply rooted tradition in public education of local control over the operation of schools. See *Milliken* v *Bradley, supra*, 418 US at 742-743. The cost of the centers is not being defrayed by additional, unappropriated state funds, but from federal funds allocable to the Detroit Board pursuant to law. And the establishment of the centers is an *educational* objective which the State Board, over many years, has urged the Detroit Board to undertake.

The "excess cost in addition thereto" was set forth as follows:

Reading	$ 4,600,000
In-Service	2,454,000
Testing	539,000
Counseling	4,052,000[9]
Total	$11,645,000

Thus, the District Court ordered Milliken, et al, to pay to the Detroit Board unappropriated state funds in the amount of 5.8 million dollars in addition to the estimated 192.5 million dollars of appropriated funds (an increase of approximately 28.5 million dollars over 1975-76) that the Detroit Board will receive in state school aid in the 1976-77 school year. 1972 PA 258, as amended by 1976 PA 258; MCLA 388.1101 *et seq*; MSA 15.1919 (501) *et seq*. See Affidavit [of Robert N. McKerr] in Support of Stay Motion, dated July 14, 1976, filed in the District Court on July 15, 1976, Docket Entry 911 (A I). The purpose of the payment is to defray one-half the cost of expanding, system-wide, components currently existing system-wide in the Detroit schools at an admitted expenditure in the amount of 75.9 million dollars.[10] Further, the four compo-

[9]

In its plan for a comprehensive guidance and counseling program for grades K-12, dated September 30, 1975, filed with the District Court, the Detroit Board stated that elementary school counselors would be employed for the first time at an additional cost of approximately 4 million dollars. (September 30, 1975 Plan, p 13).

[10]

In the 1973-74 school year, the Detroit school district ranked 68th from the top in educational expenditures (current operating expenditures per pupil) among Michigan's 531 K-12 school districts. (MX 1, pp 32-33, R XXIX 151, R XXIX 153; R XXX 41). In that year in terms of local tax effort, the Detroit Board levied 22.51 mills for school operating purposes as compared with a state-wide average of 25.59 mills. (MX 2, R XXIX 163-164). In the 1973-74 school year, the Detroit Board's

nents were finally ordered to be placed in effect some nine months after the desegregation plan for pupil reassignment had been implemented "in an orderly manner and in a spirit of community cooperation, without substantial disruption or disorder." (PA 162a). Finally, it should be noted that although the desegregation plan "changed the racial balance in 105 schools out of approximately 300 zoned schools" (PA 161a), the District Court's Judgment mandated *district-wide* expansion of the four components. (PA 146a-147a).

The Court of Appeals affirmed the District Court's ordering of the expansion of existing, system-wide components (PA 170a-171a), and affirmed "the judgment relating to the costs of the plan, but without prejudice to the *right* of the District Court to require a larger proportionate payment by the *State of Michigan* if found to be required by future developments." (emphasis supplied) (PA 180a). In effect, the Court of Appeals drew a sight draft on the treasury of the State of Michigan and affirmed the "right" of the District Court to fill in the amount.

On October 6, 1976, the Detroit Board filed the affidavit of its president saying that it would pay its one-half share ($5.8 million) of the excess, additional cost of the expansion of the

general fund revenues exceeded its general fund expenditures by the amount of $7.1 million and at the close of the year it had a general fund balance of $11,574,906. (R XXV 10-12).

In the 1974-75 school year, the Detroit school district ranked 72nd from the top in educational expenditures (current operating expenditures per pupil) among Michigan's 530 K-12 school districts. Michigan Department of Education 1974-75 Bulletin 1012. In terms of local tax effort, the Detroit Board levied 22.51 mills for school operating purposes as compared with a state-wide average levy of 26.15 mills. (State Board's Critique, p 46). The Detroit Board reported a $16,415,747 general fund balance to the State Board as of the end of the 1974-75 school year. Annual School District Financial Report for the Fiscal Year Ended June 30, 1975.

four educational components.[11, 12] On October 18, 1976, the State Treasurer signed and transmitted to the Detroit Board a warrant, for which no moneys had been appropriated, drawn on the State Treasury in the sum of $5,822,500 in compliance with the District Court's Judgment of May 11, 1976, as affirmed by the Court of Appeals. (PA 146a-147a; PA 170a-171a, 180a).[13]

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[11]

The affidavit was occasioned by the order of the District Court entered on August 3, 1976. By this order, the District Court denied the application for stay pending appeal of Milliken, et al, but the District Court also ruled "that payment by the state be triggered by the filing of an affidavit of the President of the Detroit Board of Education asserting that the Detroit Board is able to provide its share of the necessary funding." (Order, August 3, 1976, p 5). On October 15, 1976, the Court of Appeals granted Milliken, et al, a 15 day stay to allow them to seek a stay from the Supreme Court or a Justice thereof. On September 1, 1976, Mr. Justice Stewart denied the application of Milliken, et al, for a stay pending the filing of a petition for a writ of certiorari.

[12]

The Detroit Board on August 3, 1976, and on November 2, 1976, submitted to its electors a proposition to increase the constitutional limitations on taxes (Mich Const 1963, art 9, § 6) by 5 mills. The proposition was defeated at both elections.

[13]

There is another proceeding connected with this case now pending on appeal in the Court of Appeals. On April 29, 1976, the Detroit Board filed a petition in the District Court to restrain the acquisition by the Michigan Department of Corrections from the Salvation Army of a residence facility to be used as a community corrections center. The facility is located across the street from and about one-half block north of the Detroit Board's Cass Technical High School. After the Department of Corrections and the Salvation Army were added as parties by order of the court and after hearings during the month of May, 1976, on June 25, 1976, the District Court filed an opinion holding that the purchase and sale be enjoined on the grounds that the use of the facility by the Department of Corrections could affect the enrollment of Cass Technical High School and, therefore, could affect the desegregation of the Detroit schools. A permanent injunction was entered against the

SUMMARY OF ARGUMENT

Under the precedents of this Court, the scope of the remedy in school desegregation cases is determined by the nature and extent of the constitutional violation. Here, there has been no adjudicated constitutional violation with regard to the educational programs in the Detroit school system. Thus, the lower court orders compelling Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from the State Treasury to the Detroit Board, to pay one-half the cost of court ordered educational program expansions, should be reversed for the reason that they are not supported by any constitutional violation with regard to educational programs in the Detroit school system.

In this case, there has been no adjudication that Michigan's system of school financing is unconstitutional. The lower court orders compelling Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from the State Treasury contrary to Michigan law, are inconsistent with the sound principles of federalism enunciated by this Court that limit the power of the federal courts to enjoin state officials. The Tenth Amendment, as interpreted by this Court, precludes the federal courts from forcing their choices upon the states as to the conduct of integral governmental functions, including the appropriation of finite state tax dollars among competing demands from the myriad of governmental programs and services financed with state legislative appropriations. The Eleventh Amendment, as interpreted by this Court, bars the federal courts from compelling the payment of additional, unappropriated funds from the State Treasury.

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purchase and sale on July 8, 1976. Milliken, et al, filed their notice of appeal on July 14, 1976 and their brief and the appendix were filed with the Court of Appeals on November 15, 1976. The Salvation Army has appealed also.

The lower court orders here under review threaten the legal, political and fiscal integrity of the states under our federal system of government set forth in the Constitution. Thus, this Court should reverse the decrees entered below ordering the payment of additional, unappropriated funds from the State Treasury to finance court ordered educational program expansions.

ARGUMENT

I.

IN THE ABSENCE OF ANY ADJUDICATED CONSTITUTIONAL VIOLATION WITH RESPECT TO EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ORDERING THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS IS BASED UPON AN ERRONEOUS LEGAL STANDARD THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

In affirming the District Court's order relating to the educational components here at issue and the financing of same, the Sixth Circuit Court of Appeals held:

> ". . . We affirm that part of the judgment relating to the costs of the plan, but without prejudice to the right of the District Court to require a larger proportionate payment by the State of Michigan if found to be required by future developments." (PA 180a)

It is this judicially decreed blank check, to be filled in and drawn upon the Treasury of the State of Michigan to pay for court ordered educational program expansion, that is before this Court for review.

This Court enunciated the following legal standard in *Milliken* v *Bradley, supra,* 418 US, at 744:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U.S., at 16. . . ."

In the instant cause, there has not been any adjudicated constitutional violation with respect to educational programs in the Detroit school system. *Milliken* v *Bradley, supra,* 418 US, at 724-736.

Indeed, during oral argument in the remedial phase of this cause following remand by this Court, plaintiffs' counsel stated the following:

> ". . . The first thing we should say about the components is that under those circumstances do we, nor may this Court accept those components as a substitute for achieving the constitutional remedies required by the constitutional violations. The violations were not with respect to the absence of guidance counsellors, they were not with respect to the absence of certain testing components, they were not with respect in-service training, they were not with respect to the absence of career education, or student rights, or school community relations. . . ." (R June 26, 1975, 131)

Plaintiffs' desegregation plan filed in the District Court dealt solely with pupil reassignment. Such plan did not contain any "educational components." (PA 24a) Moreover, plaintiffs' expert witness, who prepared their desegregation plan, testified that the plan eliminated the segregation found to exist in the Detroit city schools in conformity with this Court's prior remand of this cause. (A 58)

In the brief filed by plaintiffs in the Sixth Circuit, at p 5 n 6, the following appears:

> "The district court has attached undue significance to ruling on matters *wholly unrelated* to desegregation of students and faculty in schools. See e.g. Memorandum and Order, July 3, 1975 (student code of conduct); Memorandum Opinion and Remedial Decree, August 16, 1975, at 99-119 ('educational components' of desegregation)." (emphasis added)

The reply brief filed in the Sixth Circuit by defendant, Detroit Board, the moving party behind the so-called "educational components," states, at p 6, that "it does not necessarily follow that since there has been no specific finding of a constitutional violation in the areas included in the educational components, therefore, these components are automatically excluded from a remedy designed to cure the constitutional violation of segregated schools." Thus, such Board admits the lack of any adjudicated constitutional violation as to the scope or content of the reading, in-service training, testing or guidance and counseling programs conducted by it in the Detroit school system.

Thus, it is beyond dispute that there are no constitutional violations with regard to educational programs in the Detroit school system. Further, as accurately stated by plaintiffs, Bradley, et al, on whose behalf the case was brought, the "educational components" are "wholly unrelated" to desegregation of pupils in Detroit's schools.

Nevertheless, the Sixth Circuit sustained the inclusion of the four components here at issue by affirming the trial court's purported finding of fact that the components are needed to remedy the effects of past segregation, to successfully desegregate and to help avoid resegregation. (PA 170a). This is

the same approach previously used by the lower courts in purporting to make factual findings that the Detroit school system could not be desegregated within Detroit. This Court properly reversed the lower courts on that issue, holding that they had employed an erroneous legal standard in seeking to achieve the racial balance they deemed desirable. *Milliken* v *Bradley, supra,* 418 US, at 739-747, 752-753. So here, the lower courts used an erroneous legal standard in compelling educational program expansions in the absence of any underlying constitutional violation with respect to such educational programs in the Detroit school system.

The Sixth Circuit cites only one case, *Brown* v *Board of Education,* 347 US 483 (1954), in support of its inclusion of expanded educational programs in the desegregation remedy herein. (PA 168a-172a). However, in *Brown* v *Board of Education,* 349 US 294, 300-301 (1955), dealing with remedy, there is no suggestion that system wide expansion of educational programs is to be a part of a school desegregation remedy.

Moreover, in the 22 years since *Brown, supra,* there have been hundreds of school desegregation remedies that have satisfied the requirements of the Constitution without the inclusion of so-called "educational components." In fact, the trial court in this cause ruled that "[t]here no longer is a denial of their right to equal protection when there are no schools from which they are excluded." (PA 62a).

As this Court noted in *Brown, supra,* 349 US, at 300, "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." More recently, in *Swann* v *Charlotte-Mecklenburg Board of Education,* 402 US 1, 23 (1971), this Court observed that "[o]ur objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on

account of race." With regard to the operation of schools, other than pupil reassignment, this Court stated that "normal administrative practice" should suffice. *Swann, supra,* 402 US, at 18-19.

Most recently, in *Pasadena City Board of Education* v *Spangler,* ..... US .....; 96 S Ct 2697, 2705 (1976), this Court ruled as follows:

> ". . . For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

Manifestly, the appropriate remedy for unlawful pupil assignment practices is pupil reassignment rather than court ordered expansion of existing educational programs. The prior decisions of this Court contain no intimation that schools cannot be desegregated without court ordered "educational components."

The judicial task is to correct the condition that offends the Constitution. *Swann, supra,* 402 US, at 16. Here, there is no condition that offends the Constitution with respect to the scope and content of educational programs in the Detroit school system. Thus, that portion of the unprecedented remedy ordered below dealing with expanded educational programs for in-service training, testing, reading and guidance and counseling is contrary to the decisions of this Court in *Brown, supra; Swann, supra; Milliken, supra;* and *Spangler, supra.*

The Sixth Circuit's inclusion of expanded educational programs in the remedy here is in conflict with the decision of the Tenth Circuit Court of Appeals in *Keyes* v *School District No 1, Denver, Colorado,* 521 F2d 465, 480-483 (CA10, 1975),

cert den, 423 US 1066 (1976). In that case, the Court vacated that portion of the trial court's order compelling the establishment of educational programs tailored to the needs of minority children, noting the lack of relationship between the constitutional violation, discriminatory pupil assignment, and the court ordered relief, establishment of educational programs.

In *Keyes, supra*, the specially concurring opinion of Judge Barrett contains the following sound language:

> "There are no easy or quick solutions to many problems confronting our country. It is a serious mistake, in my judgment, to interject the federal judiciary in the operation, composition, management and control of the state school systems. It was never intended that such would be the case. The federal judiciary is not designed to operate and manage school systems. . . ." 521 F2d at p 490

The cases of *Hart* v *Community School District of Brooklyn, New York School District No 21*, 383 F Supp 699 (ED NY, 1974), *aff'd*, 512 F2d 37 (CA2, 1975), and *Morgan* v *Kerrigan*, 530 F2d 401 (CA1, 1976), *cert den*, ... US .....; 96 S Ct 2648, 2649 (1976), dealt with magnet schools having special programs to attract students as a part of pupil reassignment for desegregation. In contrast, here we have the court ordered expansion of existing educational programs on a system wide basis that far exceeds in scope the number of schools involved in pupil reassignment, without any prior finding of a violation in the scope and content of educational programs in the Detroit school system.

The question of whether to expand existing educational programs in the Detroit school system is reposed in the sound discretion of the Detroit Board, consistent with its available local, state and federal financial resources. *Milliken* v *Bradley, supra*, 418 US, at 742 n 20. Moreover, this Court has held that there is no constitutional right to any particular level of educational programming and funding of same in the public schools, noting that there is no consensus in this area that more is always better. *San Antonio Independent School District* v *Rodriguez*, 411 US 1, 43 (1973). Proposed changes in public education are important matters to be debated and acted upon by concerned citizens, parents, school officials and elected representatives in the democratic political processes rather than by the federal courts.

In summary, the unprecedented inclusion of expanded system wide educational programs in the remedial orders below, unsupported by any constitutional violation as to existing educational programs, is contrary to the decisions of this Court and other courts of appeals. The remedial orders below have placed the federal courts in the position of performing school board functions rather than judicial functions. Thus, this Court should reverse the decision below as to the four "educational components" here at issue.

II.

IN THE ABSENCE OF ANY FINDING OF A CONSTITUTIONAL VIOLATION WITH RESPECT TO MICHIGAN'S SYSTEM OF FINANCING PUBLIC EDUCATION, THE LOWER COURT'S UNPRECEDENTED DECISION COMPELLING DEFENDANTS IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT TO PAY OUT 5.8 MILLION DOLLARS OR MORE IN ADDITIONAL, UNAPPROPRIATED FUNDS FROM THE STATE TREASURY IS CONTRARY TO THE CONSTITUTION AND THE DECISIONS OF THIS COURT.

Assuming, *arguendo*, that the lower courts did not exceed their remedial authority in ordering the expansion of existing educational programs, the question still remains whether the lower courts may, consistent with the Constitution and the

decisions of this Court, compel defendants in the executive branch of state government to pay out 5.8 million dollars or more in additional, unappropriated funds from the State Treasury to defray the cost of such court ordered program expansion. It is objectionable for the courts to become the arbiters of curriculum in school desegregation cases within the limits of appropriated local and state funds. It is even more objectionable for the federal courts to also usurp the powers of state legislatures over appropriating state funds.

Each year the Detroit Board receives many millions of dollars in legislatively appropriated state school aid funds. In the 1976-1977 school fiscal year, the Detroit Board will receive approximately 192.5 million dollars in state school aid funds under the statutory allocation formulas enacted by the Michigan legislature in 1972 PA 258, as amended, *supra*. See, *supra*, p 13. Milliken, et al, have never objected to the use of such funds by the Detroit Board to pay the costs of operating a desegregated school system. Indeed, once the Sixth Circuit Court of Appeals modified the District Court's initial bus purchase order to be consistent with Michigan law, Milliken, et al, did not seek appellate review by this Court. (PA 1a-5a). The issue herein is whether the federal courts may compel the disbursement of millions of dollars in additional, unappropriated funds from the State Treasury for court ordered educational program expansions.

Again, at the tnreshold we are confronted with the reality that there has been no adjudication herein that the Michigan system of financing public education violates the Constitution under this Court's controlling decision in *Rodriguez, supra. Milliken* v *Bradley, supra*, 418 US, at 751-752.[14] Thus, there

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[14]

During the remedy hearings below, plaintiffs' counsel stated ". . . This, I repeat, is a desegregation case. It is not a school finance case . . ." (R June 26, 1975, 8).

is no adjudicated violation in this case in the areas of educational programs or school finance that might justify the unprecedented financial relief ordered below against the State of Michigan and its treasury. (PA 180a).

The Sixth Circuit decision below cites no case law in which the federal courts have ordered officials in the executive branch of state government to pay out additional, unappropriated funds from the State Treasury for the cost of court ordered educational program expansion.[15] (PA 172a-180a). This unprecedented expansion of the power of the federal courts over the states, their treasuries and the right of the people in each state to have their state tax dollars appropriated by their elected representatives should not come to pass under our federal system of government.

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[15]

By way of illustrative example, the Court of Appeals cites *Scheuer* v *Rhodes*, 416 US 232, 238 (1974), a case in which this Court held that the Eleventh Amendment was not a bar to a civil action against state officers for money damages to be paid by the individual defendants rather than from the State Treasury. The Sixth Circuit also referred to *Cooper* v *Aaron*, 358 US 1 (1958), which involved the blatant disregard by state officers of a Supreme Court decision, a situation which has no relevance to the position of Milliken, et al. No court order has been, or will be, disobeyed. Moreover, *Cooper, supra*, did not in any way consider the power of a federal court to order payment of state funds in light of the Eleventh Amendment. The Court of Appeals relied heavily on *Wyatt* v *Aderholt*, 503 F2d 1305, 1318-1319 (CA5, 1974). However, a reading of that case reveals that no coercive relief was granted compelling the payment of funds from the State Treasury. In *Wright* v *Houston Independent School District*, 393 F Supp 1149 (SD Tex, 1975), the basic question was whether the local school district could be considered a state agency for Eleventh Amendment purposes.

A. Established principles of federalism preclude the relief granted below compelling the disbursement of 5.8 million dollars in additional, unappropriated funds from the State Treasury to the Detroit Board.

In *Rizzo v Goode*, 423 US 362 (1976), this Court reversed the lower court orders compelling the defendant city officials to implement internal procedures within the police department relating to the handling of citizen complaints against police officers. In doing so, this Court enunciated the sound principles of federalism that serve to limit the injunctive power of the federal courts over those in charge of state and local governmental agencies, as follows:

> "Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. *We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.* Indeed, in the recent case of Mayor v Educational Equality League, 415 U.S. 605 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existance of such considerations, saying '[t]here are also delicate issues of federal-state relationships underlying this case.' Id., at 615."

423 US, at 380 (emphasis supplied)

In *Griffin v County School Board of Prince Edward County*, 377 US 218, 233 (1964), this Court ruled that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." Thus, there this Court simply directed local officials to exercise their lawful powers under state law to levy local taxes to reopen the public schools free from racial discrimination.

Here, in contrast, the lower courts have ordered petitioners, Milliken, et al, to pay out additional, unappropriated funds from the State Treasury for court ordered program expansions in contravention of their lawful powers under state law. Under Michigan law, only the legislature may appropriate state funds. In Mich Const 1963, art 9, § 17, the people have provided that "[n]o money shall be paid out of the state treasury except in pursuance of appropriations made by law." In Mich Const 1963, art 4, § 30, it is provided that "[t]he assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes."

With specific regard to state school aid to school districts, Mich Const 1963, art 9, § 11 provides as follows:

> "There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education and school employees' retirement systems, as provided by law. One-half of all taxes imposed on retailers on taxable sales at retail of tangible personal property, and other tax revenues provided by law, shall be dedicated to this fund. *Payments from this fund shall*

be made in full on a scheduled basis, as provided by law."[16] (emphasis supplied)

The Address to the People accompanying Michigan Const 1963, art 9, § 11 reads as follows:

> "This is a new section which directs the legislature to establish a School Aid Fund to which must be dedicated one-half of all state sales tax collections and such other revenues as the legislature may determine. Moneys in the fund must be used for support of education and school employees' retirement systems. *Payments from the fund are to be made in full on a basis scheduled by legislative enactment. . . .*" (emphasis supplied)

2 Official Record, 1961 Constitutional Convention, p 3400.

The appellate courts of Michigan have consistently ruled that, under Michigan law, only the legislature may appropriate state funds. *City of Jackson* v *Commissioner of Revenue,* 316 Mich 694, 719-720; 26 NW2d 569, 579 (1947), *Board of Education of the City of Detroit* v *Superintendent of Public Instruction,* 319 Mich 436, 456; 29 NW2d 902, 911 (1947). More recently, in *Regents of University of Michigan* v *Labor Mediation Board,* 18 Mich App 485, 490; 171 NW2d 477, 479, (1969), the Court stated that ". . . the legislature is the only body that has the power to appropriate the public funds of this state."

In *Rizzo, supra,* this Court held that principles of federalism precluded the federal courts from imposing internal procedures upon a municipal police department even though, in that case, the defendants had the authority under state law to implement such procedures. Here, the lower federal courts have ordered Milliken, et al, to act beyond their authority under state law in disbursing millions of dollars in additional, unappropriated state funds to the Detroit Board. Such orders subvert Michigan's constitutional and statutory provisions reposing the appropriations power in the Michigan legislature. They are patently destructive of federal-state relations since such orders are in contravention of the constitution adopted by the people of Michigan and the appropriations statutes enacted by the elected representatives of the people of Michigan. In short, sound principles of federalism preclude the federal courts from usurping the authority of state legislatures to appropriate state funds.

[16]

The Michigan Supreme Court has held that the phrase "provided by law", as employed in the 1963 Michigan Constitution, means that the legislature is to do the entire job of implementation. *Beech Grove Investment Company* v *Civil Rights Commission,* 380 Mich 405, 418-419; 157 NW2d 213, 219 (1968).

B. The financial relief ordered below, compelling the disbursement of 5.8 million dollars in additional, unappropriated funds from the State Treasury, is precluded by the Tenth Amendment as interpreted by this Court.

Recently this Court held, in *National League of Cities* v *Usery,* ..... US .....; 96 S Ct 2465 (1976), that the power of the Congress under the Commerce Clause did not, because of the Tenth Amendment, extend to imposing minimum wage requirements on the states and their political subdivisions. In reaching that result, this Court noted the financial impact of such requirement on state governments and concluded its opinion with the following:

> "But we have reaffirmed today that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States* v *California,* simply wrong. Congress may

not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty,' 392 U.S., at 205, 88 S. Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled."

..... US .....; 96 S Ct, at 2475-2476

In the specially concurring opinion of Judge Barrett in *Keyes, supra*, the following applicable language appears:

> ". . . No one would contend that the federal judiciary is the body to allocate available state funds to the integrative objectives of the school systems in such a manner that it will decide the priority and amount of remaining funds for other necessary and proper state governmental functions. The Tenth Amendment did reserve to the people of the various sovereign states those powers not otherwise expressly delegated to the Federal Government."
>
> 521 F2d, at 490

Here, the Tenth Amendment is also a limitation on the power of the federal courts to force their choices upon the states as to the conduct of integral governmental functions, including

the appropriation of finite state tax dollars among competing demands from all levels of public education and the myriad of other governmental programs and services financed with state legislative appropriations. *Bradley* v *School Board of Richmond, Virginia*, 462 F2d 1058, 1068 (CA4, 1972), aff'd by equally divided court, 412 US 92 (1973). *National League of Cities* v *Usery, supra.*

C. The financial relief ordered below, compelling the disbursement of 5.8 million dollars in additional, unappropriated funds from the State Treasury, is precluded by the Eleventh Amendment as interpreted by this Court.

In *Edelman* v *Jordan*, 415 US 651, 663 (1974), this Court noted that ". . . the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. . . ." Here, the lower court orders at issue directly compel the payment of millions of dollars in additional, unappropriated funds from the State Treasury. Thus, under the precedents of this Court, the financial relief granted below should be reversed.[17]

The evolution of the rule enunciated in *Edelman, supra*, can be traced through a number of prior decisions of this Court.

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Here, unlike *Ex Parte Young*, 209 US 123 (1908), the relief is not directed to enjoining a state officer from enforcing an unconstitutional statute. There has been no ruling in this case that any Michigan statute dealing with the financing of public schools is unconstitutional. Absent such a ruling, *Ex Parte Young, supra*, is inapplicable. *Worchester County Trust Company* v *Riley*, 302 US 292, 300 (1937). Also, unlike *Fitzpatrick* v *Bitzer*, ... US .....; 96 S Ct 2666 (1976), here there is no congressional legislation authorizing the federal courts to grant relief compelling the payment of additional, unappropriated funds from the State Treasury for court ordered educational program expansion in school desegregation cases.

In *Louisiana* v *Jumel*, 107 US 711 (1883), bondholders sued to obtain payment of principal and interest on their bonds. This Court, although acknowledging that Louisiana had violated its contract with the bondholders, nevertheless denied relief, holding that:

> ". . . The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. . . . But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."
>
> 107 US, at pp 727-728

In *Hans* v *Louisiana*, 134 US 1 (1890), a citizen of Louisiana brought suit to compel payment on bonds issued by the State of Louisiana. In affirming dismissal of the case, this Court ruled that:

> "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed

> by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."
>
> 134 US, at p 21

Here, contrary to the above quoted language of this Court, the lower federal courts have substituted their judgment for that of the Michigan legislature in determining the level of appropriations from the State Treasury to the Detroit Board.

This Court, in *Great Northern Life Insurance Co* v *Read, Insurance Commissioner*, 322 US 47 (1944), dismissed, for lack of jurisdiction, a suit to recover taxes paid to the State of Oklahoma. In doing so, the Court observed that ". . . when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." 322 US, at p 54. In the instant cause, the lower courts have clearly invaded "the sovereign exemption from judicial interference in the vital field of financial administration" by compelling the payment of millions of dollars in additional, unappropriated funds from the State Treasury.

In *Ford Motor Co* v *Department of Treasury of Indiana*, 323 US 459, 464 (1945), this Court held that ". . . when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. . . ." So here, the immunity granted the State of Michigan under the Eleventh Amendment and the decisions of this Court precludes the lower court orders compelling payment of moneys from the State Treasury.

In *Edelman, supra*, this Court held that the Eleventh Amendment precluded the federal courts from ordering the payment of welfare benefits from the State Treasury even though such benefits had been wrongfully withheld. In reaching that result, the Court noted, 415 US, at p 667 n 12, that *Griffin, supra*, involved an order directed to county officials that did not fall within the ambit of the Eleventh Amendment's jurisdictional bar.

In this case, the decree sought to be reviewed does not direct state officials to alter their previous course of conduct, in compliance with a substantive federal-question determination concerning pupil assignment in the Detroit schools, with an ancillary effect on the State Treasury. Rather, the decree sought to be reviewed directly commands "the State of Michigan" to pay out millions of dollars in additional, unappropriated state funds for court ordered program expansion, to remedy the claimed effects of its alleged prior wrongdoing with regard to pupil assignment. (PA 170a, 178a, 180a). It is, in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials. Therefore, such decree is precluded under this Court's holding in *Edelman, supra*, 415 US, at 668.

The reference below to "the normal share of State school aid funds provided to Detroit" is misplaced. (PA 178a). There

is no normal share of state aid funds provided Detroit, but only the amount each year which the Detroit school system is entitled to receive based upon the statutory appropriation and allocation formulas enacted by the legislature in 1972 PA 258, as amended, *supra*. Further, at what point, if ever, will the Michigan legislature have appropriated sufficient funds to the Detroit school system to satisfy the lower courts view of sound educational and fiscal policy so that additional, unappropriated funds will not have to be disbursed to such school system pursuant to the orders of the lower federal courts? (PA 180a).

The orders below have a most detrimental effect on the fiscal integrity of the State of Michigan. For the 1976-1977 state fiscal year, the most recent estimate provided the Michigan legislature by the Michigan Budget Director is that the state's general fund balance, as of the close of such fiscal year, will be a deficit of 140.3 million dollars. This estimate includes, as an expenditure, the 5.8 million dollars in additional, unappropriated funds paid by the State Treasurer to the Detroit Board on October 18, 1976, as a result of the lower court orders here under review.

Clearly, the decisions below have superimposed upon this already strained state fiscal situation the expenditure of 5.8 million dollars in additional, unappropriated funds. Thus, it will be more difficult to attempt to balance the state's general fund pursuant to Mich Const 1963, art 5, § 20.[18] In making

[18]

"No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes."

reductions in expenditures authorized by appropriations, should the Governor and the legislative appropriations committees make reductions in social services, mental health or corrections appropriations to offset the judicially decreed expenditure of an additional 5.8 million dollars in unappropriated state funds to the Detroit school system? This result, we submit, is what the Eleventh Amendment was intended to preclude.

The Detroit Board recently submitted its balanced budget to the Michigan Department of Education for the 1976-1977 school fiscal year. Such budget reveals that the Detroit Board finished the 1975-1976 school fiscal year with a general fund equity surplus of 7.4 million dollars and that its projected expenditures for 1976-1977 were 398.6 million dollars. Thus, it is readily apparent that, contrary to the self-serving portrayal of economic deprivation submitted below by the Detroit Board and adopted by the Sixth Circuit, the Detroit school system has been financially sound in recent years even though its local tax effort for school operating purposes has been below the statewide average. In this regard, see, *supra*, p 13 n 10.

Michigan's system of financing public education includes both local property tax revenues and legislative appropriations of state school aid funds to school districts. Mich Const 1963, art 9, §§ 6 and 11. Michigan has adopted a modified district power equalizing system of school finance which encourages and rewards local tax effort by guaranteeing a fixed level of funding per pupil in combined state and local funds for each mill of school operating property taxes levied at the local level. See section 21 of 1972 PA 258, as amended, *supra*.

In *Rodriguez, supra*, 411 US, at 40-44, 49-55, this Court sustained the validity of the Texas system of financing public education, ruling that matters of state fiscal and educational policy are best determined at the state or local level under our federal system. There, this Court held that reliance on variable

local school district property taxes for financing public education furthered the legitimate purpose of local control of education consistent with the Equal Protection Clause.

Here, as in *Rodriguez, supra*, we have a system of financing public education based upon a combination of local property tax revenues and legislative appropriations of state school aid. In Michigan the state school aid statute is designed to encourage and reward local tax effort for public education. As long as the prospect of increased state funding for the Detroit Board by federal court order looms large, the voters in Detroit will lack incentive to approve property tax increases for school operating purposes. See, *supra*, p 15 n 12. Further, Michigan's statewide system of financing public education will be disrupted, contrary to the decision of this Court in *Rodriguez, supra*.

In summary, the lower courts have assumed the role of the Michigan legislature in ordering Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from the State Treasury to pay the cost of court ordered educational program expansion in the Detroit school system. This, we submit, is contrary to the decisions of this Court in *Edelman, supra*, and *Rodriguez, supra*.

III.

CONCLUSION

The orders entered below, compelling the payment of 5.8 million dollars in additional, unappropriated funds from the State Treasury for court ordered educational program expansion this year, threaten the legal, political and fiscal integrity of the states under our federal system of government set forth in the Constitution. Further, pursuant to the orders entered

below, additional payments will be made in subsequent years in amounts to be determined by the District Court pursuant to the blank check issued by the Court of Appeals. (PA 180a). Unless the states are to become mere appendages of the federal judiciary in the conduct of state and local governmental affairs, such orders should be reversed by this Court.

Previously in this case, the lower courts approved an unprecedented multi-district remedy to "produce the racial balance which they perceived as desirable," and earned reversal by this Court. *Milliken* v *Bradley, supra,* 418 US, at 740. In the orders presently under review, the lower courts have become the educational and financial arbiters of curriculum and school finance for the Detroit school system and the State of Michigan to produce the educational and financial results which they perceive as desirable. As in *Milliken* v *Bradley, supra,* this Court should reverse the unprecedented decision below.

Wherefore, petitioners Milliken, et al, respectfully request that this Court reverse the opinion and judgment of the Sixth Circuit Court of Appeals insofar as such opinion and judgment compel Milliken, et al, to disburse additional, unappropriated

funds from the State Treasury to the Detroit Board to pay for the cost of court ordered educational program expansion in the Detroit school system.

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respondent's brief

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-447

WILLIAM G. MILLIKEN, *et al.*,
Petitioners,

—v.—

RONALD BRADLEY, *et al.*,
Respondents.

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BRIEF FOR BRADLEY RESPONDENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Given the *de jure* segregation of the Detroit Public Schools, did the courts below have the equitable authority to include such ancillary administrative and educational relief in the desegregation remedy as was shown necessary to begin to eliminate the continuing effects of the segregation violation and to assure the transition to and maintenance of a racially non-discriminatory school district?

2. Do constitutional principles of federalism, the tenth amendment, or the eleventh amendment shield State defendants, who have previously been adjudicated to have contributed substantially to the *de jure* segregation of the Detroit Public Schools, from participating generally in implementing appropriate ancillary relief?

3. Does the eleventh amendment particularly bar the State defendants from sharing in the fiscal consequences of implementing such prospective relief?

4. Assuming *arguendo* the equitable authority and constitutional power, did the courts below properly exercise their equitable discretion in ordering such relief against State defendants in the particular circumstances of this case?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, statutes, and regulations involved are reprinted in Appendix B attached hereto. They include the tenth, eleventh, and fourteenth amendments to the Constitution; 20 U.S.C. §§ 1601 and 1606(a); 20 U.S.C. §§ 1702(b), 1703(a), (b), (f), 1706, 1708, 1720(a); 28 U.S.C. §§ 1331, 1343 (3) and (4); 42 U.S.C. § 1983; 42 U.S.C. §§ 2000c-2 and c-4; 45 C.F.R. §§ 180.12, .31, .41; 45 C.F.R. §§ 185.01 and .12.

STATEMENT OF THE CASE

A. Introduction

As this Court knows, the Detroit school case has not heretofore been marked by procedural simplicity nor general agreement on the controlling constitutional or equitable principles. *See, e.g., Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir., 1973) (*en banc*), *rev'd in part sub nom. Milliken* v. *Bradley*, 484 U.S. 717 (1974) (opinion of Burger, C.J., for the Court), 753 (Stewart, J., separate concurring opinion), 757 (Douglas, J., dissenting), 762 (White, J., dissenting), 781 (Marshall, J., dissenting). The remedial proceedings in the district court following this Court's remand in *Milliken* for elimination of the *de jure* segregation within the Detroit Public Schools can only be characterized as procedurally flawed and, in several respects, substantively bizarre. Fortunately, the Court of Appeals, despite its express misgivings with the limitations set in *Milliken* (PA 5a-6a and 151a-152a, 158a n. 3), has acted to reverse the substantive errors and has remanded for further proceedings (PA 182a).*

Among the numerous parties, only the State defendants have petitioned this Court to review any portion of the judgment of the Court of Appeals, and then only with respect to the requirement that they pay a share of the costs of four aspects of desegregation relief ancillary to pupil reassignments. Without unduly belaboring the prior history and record in this cause, we believe that a review of the case will show that the State Petitioners present considerably narrower equitable and constitutional issues than their rhetoric would admit.

Moreover, such review will provide grounds for this Court to find substantial, if not unanimous, agreement with the judgment of the Court of Appeals, without reaching the monumental constitutional issues expressly left open in *Ex parte Young*, *Edelman* v. *Jordan*, *National League of Cities* v. *Usery*, *Fitzpatrick* v. *Bitzer*, and *Mt. Healthy City School District* v. *Doyle*. Notwithstanding the representations of State Petitioners and their *amici curiae* friends, this is not the case for the Court to decide either to rend or to mend the very fabric

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* The opinions and orders contained in the Appendix to the Petition for Certiorari will be cited in the form, for example, PA 151a; reference to prior opinions will be to the official reports, e.g., 484 F.2d 215 or 418 U.S. 717. Reference to record materials contained in the joint appendix will be in the form A 53. Reference to other record evidence will be in the following form: e.g., VPX 3 and 22 VTr 2506 for plaintiffs' exhibit 3 and volume 22, page 2506, of the transcribed testimony from the 1972 violation hearings; MTr 35 and MSX 5 for page 35 of the transcribed testimony and State defendants' exhibit 5 from the 1973 remedy hearings on Detroit-only and metropolitan plans; and RTr 5/20/75 at 65 for page 65 of the testimony transcribed on May 20, 1975, during the 1975 remedy hearings on remand from *Milliken*.

of the Constitutional Union with respect to the claim of State sovereignty. To put the point somewhat differently, a review of the prior proceedings will show that this is not the case by which to determine under our Constitution whether "the States [have been denigrated] to a role comparable to the departments of France" relative to the enumerated National powers, *Elrod* v. *Burns*, 49 L.Ed.2d 547, 567 (1976) (Burger, C.J., dissenting), or whether the States have recently been promoted to sovereignty virtually as complete as that of France itself, even on matters specifically delegated by the Constitution to the previously supreme authority of the Federal government. *See National League of Cities* v. *Usery*, 49 L.Ed.2d 295, 260-74 (Brennan, J., dissenting).

B. The Pre-*Milliken* Proceedings

Plaintiffs Ronald Bradley, et al., Detroit school children and their parents, filed their Complaint on August 18, 1970, against the Superintendent and Board members of the Detroit Public Schools and against the State Board of Education, Superintendent of Public Instruction, Attorney General, and Governor.[1] Plaintiffs alleged that defendants and their predecessors in office acted with the purpose and effect to foster and to maintain a *de jure* segregated public school system and denied plaintiffs equal educational opportunities along racial lines. Plaintiffs prayed for complete relief from these unconstitutional practices including, *inter alia*, complete desegregation; elimination of the racial identity of every school in all respects; maintenance now and hereafter of a unitary, racially non-discriminatory school system; and such

[1] Prior to the evidentiary hearings on violation, the Detroit Federation of Teachers and a white citizens' group intervened as parties defendant. During the remedial hearings following the violation findings, the Treasurer of the State of Michigan was joined as a party defendant and various suburban school districts were permitted to intervene as parties defendant.

further relief as would appear to the district court to be equitable and just. *See* Complaint.

During preliminary proceedings and appeals, portions of Act 48 of Michigan Public Acts of 1970 were declared unconstitutional because they obstructed and nullified a partial, voluntary high school desegregation plan adopted by the Detroit Board and "had as their purpose and effect the maintenance of segregation." 343 F. Supp. 582, 589 (1972); 433 F.2d 897 (1970). Upon direction from the Court of Appeals, 438 F.2d 945 (1971), evidentiary hearings on the merits began in the district court on April 6, 1971, and continued for forty-one trial days through July 22, 1971. Plaintiffs introduced substantial evidence to show not only the pervasive and long-standing *de jure* segregation of pupils, but also racial discrimination in other aspects of schooling, including faculty and staff assignment and the allocation of educational resources. Plaintiffs also introduced substantial evidence of the harmful consequences of all these racially discriminatory practices and conditions on the educational opportunities currently enjoyed by black pupils.[2]

[2] *See, e.g.*, VPX 3 at 72-134, VPX 107 at 294-98, VPX 177-78, VPX 154C, VPX 161-66, VJXFFFF, 15 VTr 1611-21, 16 VTr 1805-10, 20 VTr 2180-86, 22 VTr 2506-18, 38 Tr. 4340 (faculty and staff segregation); 8-9 VTr *passim*, 16 VTr 1779-91, 37 VTr 4148-56, 41 VTr 4665-66, 41 VTr 4677-78, VPX 107 at 298, VPX 134, VPX 161-64, VDX NNN (allocation of educational resources and opportunities along racial lines and harmful effects of segregated schooling on the pupils). In summary, plaintiffs' proof showed that the racial composition of faculty and staff still mirrored the racial composition of student bodies; through 1955 the Detroit Board never assigned black teachers to majority white schools; and through 1965, the Board assigned black teachers to predominantly white schools only if acceptable to that particular school community. Plaintiffs' proof also showed that educational resources were allocated in a pattern of "systematic differentiation parelleling racial lines" 41 VTr 4665-66. Thus, for example, substantially more emergency substitutes and inexperienced teachers were assigned to black schools than to white; and the average teacher salary in black schools was $1,400 to $1,800 less than in white schools, VPX 161-64. Finally, plain-

On September 27, 1971, the district court, Hon. Stephen J. Roth sitting, issued its opinion on violation. 338 F. Supp. 582. The court found that both State and local defendants, as well as the State of Michigan, acted directly, jointly and severally through a variety of traditional segregation practices "with a purpose of segregation" to create and to aggravate the then current condition of almost total segregation of pupils. 338 F. Supp. at 587-89, 592. The district court, however, rejected the similar allegations and evidence with respect to faculty and staff assignments, 338 F. Supp. at 589-91, and made no findings with respect to the proof of racial discrimination in the allocation of educational resources and opportunities and the harmful effects on the pupils of the *de jure* segregation. On October 4, and November 5, 1971, the court ordered the State and local defendants to submit Detroit-only and area-wide plans to remedy the *de jure* segregation found.[3]

At the evidentiary hearings in March and April, 1972, on the Detroit-only and area-wide plans, the district court received substantial evidence from *all* parties on the need for relief ancillary to pupil desegregation. The evidence on such ancillary relief supported, *inter alia*, faculty and staff desegregation; elimination of racial discrimination

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tiffs proof showed the harmful and stigmatizing consequences of the pervasive racial discrimination on "the hearts and minds" (*Brown* v. *Board of Educ.*, 347 U.S. 483, 493-94 (1954)) of the pupils and the educational opportunities of black pupils, including particularly with respect to reading. *E.g.*, 8 VTr 863-86, 895, 920-21, 935-40, 950-69; 9 VTr 960; VPX 134.

[3] The Detroit Board and State defendants filed notices of appeal from this order and the violation opinion. Plaintiffs filed a protective cross-appeal and a motion to dismiss these appeals because the order and opinion were not "final," adjudicated no substantial rights of the parties, and represented no "judgment" from which to permit appellate review. On February 23, 1972, the Court of Appeals dismissed the appeals because there was "no final order from which an appeal may be taken." 468 F.2d 902, 903, *cert. denied*, 409 U.S. 844.

in school facilities and other educational resources; elimination of racial discrimination from curriculum, tests, programs, and counseling services; multi-racial and remedial curriculum; and in-service training for faculty and other staff. No party, including State defendants, presented any contrary evidence on the need for such ancillary relief as a part of implementing desegregation relief.[4]

In its June 14, 1972, opinion in support of "Ruling on Desegregation Area and Development of Plans" requiring area-wide relief extending beyond the Detroit School District, the district court made findings concerning the harmful consequences of *de jure* segregation on the school children and the need for restructuring facilities and reassigning staff incident to pupil reassignment, 345 F. Supp. 914, 921, 931-33. The court entered appropriate school equalization and staff desegregation orders "so as to prevent the creation or continuation of [racial] identification of schools by reference to past racial composition." 345 F. Supp. at 919. Citing the "uncontroverted evidence" received, the court also found that the "following additional factors are essential to implementation and operation of an effective plan of desegregation," including, *inter alia*, multi-racial and other curriculum reforms, in-service training for faculty and staff, and nondiscriminatory testing and counseling designed to overcome the effects of *de jure* segregation and residual racial discrimination. 345 F. Supp. at 935-36. In its order, the court included specific provisions for such ancillary relief "to insure the effective desegregation of the schools . . ." 345 F. Supp. at 919.

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[4] *See, e.g.*, MTr 35-36, 312, 353, 404-07, 470-71, 495-96, 586-87, 782, 1342-43; MSX 5, 8, 10; MPX 2. Some of the added suburban defendants, and one of the State Board plans (MSX 8), however, proposed equalizing education opportunities as an adequate substitute for pupil desegregation. *See* 345 F. Supp. 914, 921 n.1.

Subsequently, on July 20, 1972, the district court made these rulings and orders final pursuant to Rule 54(b), FED. R. CIV. P., and appealable pursuant to 28 U.S.C. § 1292(b). The State, Detroit Board, and intervening suburban school district defendants appealed.[5] These appeals focused on the *de jure* segregation violation findings and the propriety of the area-wide pupil desegregation relief ordered. The Court of Appeals, sitting *en banc*, basically affirmed the judgment of the district court but vacated and remanded to provide all potentially affected suburban school districts with the opportunity to be heard. 484 F.2d 215 (1973).

The State and intervening suburban school district defendants petitioned this Court to review the violation findings against the State defendants and/or the propriety of ordering area-wide relief based upon findings of *de jure* segregation within the Detroit School District. Upon reviewing the judgment of the Court of Appeals, this Court, on July 25, 1974, reversed that portion of the judgment permitting inter-district relief based on violation findings that State and Detroit defendants caused *de jure* segregation within the Detroit School Dis-

[5] Plaintiffs did not cross-appeal because the "final" order granting relief (in contrast to some of the particular findings and reasoning) provided *all* relief prayed for in their initial complaint and supported by their evidence: pupil desegregation, faculty and staff desegregation, and other ancillary relief designed to overcome the harmful effects of *de jure* segregation on the children, to avoid racially discriminatory provision of education opportunities, and otherwise to assure the effective transition to and maintenance of a unitary, racially non-discriminatory school system. Being a prevailing party entirely satisfied with the "final" *judgment*, plaintiffs could not appeal to review findings of fact or interim rulings they did not like, *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934), and did not need to appeal to preserve their right to argue *any* ground in support of the judgment. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970); *Langnes* v. *Green*, 282 U.S. 531, 535-59 (1931); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). *See generally*, Stern, *When to Cross-Appeal or Cross-Petition*, 87 HARV. L. REV. 763 (1974).

trict, 418 U.S. at 745-53; provided guidelines for and examples of area-wide and boundary violations necessary to support interdistrict relief, 418 U.S. at 744-45; and remanded for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit City schools," 418 U.S. at 753.

C. The Post-*Milliken* Proceedings in the District Court

The State Petitioners suggest (Brief at 18-19) that plaintiffs and their experts either opposed or did not support, in the courts below, the ancillary relief here at issue. This misrepresents plaintiffs' position in the courts below and the testimony of their experts in the district court. It also misconceives the dynamics of the remand proceedings following *Milliken*. For throughout the remand proceedings, plaintiffs and their experts supported such ancillary relief as a proper adjunct to the primary relief of actual pupil desegregation where necessary to remedy the continuing harm resulting from the segregation violation and to insure the transition to and maintenance of a racially non-discriminatory system of schooling. Plaintiffs, however, were repeatedly forced to focus the attention of the defendants and the district court on the primary desegregation remedy lest it be limited by the apparent preoccupation with ancillary relief and related financial concerns. Only with this understanding of the context may the remand proceedings be fairly understood.

Following the death of District Judge Roth on July 11, 1974, the case was assigned to District Judge Robert E. DeMascio for remand proceedings consistent with *Milliken*. Pursuant to the district court's order, the Detroit Board and plaintiffs submitted pupil reassignment plans in Spring, 1975.[6] The Detroit Board plan operated

[6] On April 16, 1975, the district court "granted the motions to dismiss filed by the intervening suburban defendants and simultaneously granted plaintiffs' motion to amend their complaint to in-

on the novel premise that only identifiably white schools need be "desegregated," thus proposing to maintain over 100 *de jure* segregated, all-black schools. The Detroit Board plan also included extensive discussion, without documentation but with "excessive" (PA 13a) cost estimates, of purportedly necessary ancillary relief.

On April 20, 1975, the State defendants submitted a "critique" of the Detroit Board's plan which queried whether any ancillary relief was appropriate but conceded that several aspects of the proposed relief (including in-service training of staff and non-discriminatory guidance, counseling, and curriculum) "deserve special emphasis in connection with implementation of a desegregation plan." *Critique* at 39, 50. Evidentiary hearings on the plans submitted and ancillary relief continued from April 29 through June 27, 1975.[7] Substantial evi-

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clude allegations of inter-district *de jure* violations." PA 13a. Subsequently, plaintiffs filed their second amended complaint alleging general causes of action for inter-district relief under *Milliken*. Proceedings on a more definite, third amended complaint have been stayed pending conclusion of the remand proceedings on Detroit-only remedy and of a cost dispute between the parties. *See* 411 F. Supp. 937; PA 168a.

[7] During these hearings, plaintiffs moved the court to order acquisition of 150 school buses, the minimum number necessary to implement either pupil reassignment plan. By order of May 21, 1975, the district court ordered the State defendants to acquire the buses. PA 1a-2a. On expedited appeal, the Court of Appeals affirmed this order with the modification that the Detroit Board acquire the buses, with the State defendants to bear 75% of the cost. PA 3a-5a, 519 F.2d 679, *cert. denied*, 423 U.S. 930 (1975). This modification was made pursuant to State defendants' representations of their willingness to conform to that procedure consistent with State practice. PA 4a. The district court subsequently followed this modified procedure and formula for sharing the costs in ordering the acquisition of 100 additional school buses. PA 161a n.4. It should also be noted, however, that the Court of Appeals specifically directed that State defendants take all necessary steps, including utilizing existing funds already allocated, or to be allocated, and reallocating existing or new funds, to pay or reimburse the State's share of such transportation acquisition. PA 5a. The

dence was introduced showing the real need for the ancillary relief here at issue—in-service training of staff, non-discriminatory testing, guidance and counseling, and remedial reading—to eliminate the continuing effects of the *de jure* segregation and discrimination and to insure the effective transition to non-discriminatory schooling. *See, e.g.*, A 7-9, 30-42, 51-61, 67-68, 72-82, 86-89; RTr 5/8/75 at 24, 66, 95-100; RTr 5/9/75 at 61-62, 72-75; RTr 5/15/75 at 42-49; RTr 5/20/75 at 127; RTr 6/12/75 at 116-17.[8]

On August 15, 1975, the district judge issued his opinion on remedy. He held that ancillary relief was appropriate and would be ordered only to the extent necessary to overcome the continuing, harmful effects of the violation, to remedy continuing racial discrimination in educational opportunities, or to insure the successful implementation of a non-discriminatory plan of pupil desegregation (PA 13a, 35a-37a, 55a, 64a-74a, 78a-79a, 81a-82a). However, the district judge rejected the constitutional requirement that the plan of pupil reassignments must itself eliminate the primary pupil segregation vio-

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State defendants concede the propriety of their sharing in these costs, did not seek review from these orders, and do not ask this Court to review these orders as part of this appeal. *See* State Petitioners' Brief at 8 and n.6.

[8] The State Petitioners' suggestion (Brief at 18) that plaintiffs' experts were of the opinion that no ancillary relief was necessary to remedy the *de jure* pupil segregation is incredible. The testimony of Drs. Foster and Stolee, only some of which is cited above, was that the four aspects of ancillary relief here at issue were essential to an effective pupil desegregation remedy and were regularly included by school districts throughout the country as necessary components in implementing pupil desegregation plans. As the former and current directors of the University of Miami Title IV School Desegregation Center, they had personal knowledge of these facts; for they have assisted literally hundreds of school districts in implementing pupil desegregation plans pursuant to their mandates from Congress and HEW, and federal funding. *See, e.g.*, 42 U.S.C. § 2000c-4(a), 20 U.S.C. § 1606(a), and 45 C.F.R. § 185.

lation found. Thus, the district court adopted the thesis that only racially identifiable white schools need be eliminated, and rejected even the Detroit Board's limiting pupil reassignment plan because it accomplished too much desegregation (PA 51a-52a, 61a). The district court simultaneously issued a Partial Judgment and Order denying the relief requested in plaintiffs' pupil desegregation plan and establishing guidelines and a timetable for further planning and submission of a revised plan by the Detroit Board.[9]

Plaintiffs filed their notice of appeal, a stay application, and a motion seeking summary reversal of the district court's rejection of their plan. Plaintiffs particularly challenged the premise that pupil reassignments need not be extended to black schools, which thereby excluded from desegregation over 100 all-black schools in the three administrative regions of the school district at

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[9] The district judge in his August 15, 1975, opinion and appendices noted that he had proceeded *ex parte* and entirely outside the record with meetings and communications with defendant parties, court experts, and non-parties to make specific fact findings and to marshall support throughout the State for "his plan" prior to its entry. *See, e.g.*, Appendices A-C to the district court's August 15, 1975, opinion and PA 13a, 15a, 50a-51a. After the August 15, 1975, opinion, the district judge's non-judicial conduct became, if anything, even more openly the rule than the exception. These extraordinary *ex parte* contacts with the defendants and non-parties were rationalized by the district court as "reflect[ing] the fact that the adversarial phase of this litigation has ended" (PA 116a n.2), despite plaintiffs' specific request for a hearing to present evidence on their objections to the revised plans submitted by the Detroit Board pursuant to the August 15 guidelines. (Plaintiffs have pending a motion to recuse the district judge for cause under 28 U.S.C. § 455(a) because, *inter alia*, of such repeated violations of Canon 3A of the ABA Code of Judicial Conduct.)

[Note: After the preparation of this brief for the printer, the district judge, on January 21, 1977, entered an order denying plaintiffs' motion to recuse, except with respect to further proceedings on the faculty segregation issue; on that issue, the district judge referred questions about his impartialty for decision by the Chief Judge of the Eastern District of Michigan.]

the very heart of the *de jure* violation. These matters were taken under advisement by the Court of Appeals and a briefing schedule set on all appeals.[10]

On October 16 and October 29, the district court issued orders concerning a monitoring commission to be implemented by State defendants and a uniform code of student conduct to be implemented in conjunction with the new pupil desegregation plan. On November 4, 1975, the district court entered a memorandum and order approving with modification the revised pupil reassignment plan submitted by the Detroit Board. On November 10, 1975, the district court issued an order concerning magnet vocational schools. On November 20, 1975, the district court entered a judgment ordering the Detroit Board to implement these plans. During the Fall, the Detroit Board also submitted revised proposals for each aspect of ancillary relief authorized in the district court's August 15 opinion and order; however, no hearings were held and no record was made on these submissions. *See* note 9, *supra;* and State Petitioners' Brief at 11 n.7.

On May 11, 1976, while the various appeals of the plaintiffs, Detroit Board, and Teacher Federation were still pending in the Court of Appeals, the district court filed a memorandum, order, and final judgment on magnet

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[10] Plaintiffs, as well as the Detroit Board and the intervening Detroit Federation of Teachers, also appealed from the district court's August 28, 1975, order requiring in each school no more than 70% faculty of either race. *Cf.* PA 83. Plaintiffs believed that this order could serve to maintain the continuing racial identifiability (e.g., RDX 6) of schools solely by reference to staff racial composition. (Plaintiffs thus appealed from the *first* judgment or order which denied them complete faculty relief. Contrast note 5, *supra*, with State Petitioners' Brief at 9.) The Detroit Board appeal argued that it should be allowed to implement complete faculty desegregation as it had requested, while the Detroit Federation of Teachers argued that the district court was without authority to order any faculty desegregation.

vocational centers,[11] uniform code of student conduct, remedial reading, in-service training, counseling and career guidance, testing, and school-community relations. PA 115a-150a. Adhering to the view expressed in its August 15, 1975 opinion, the district court was "careful to order only what is essential for a school district undergoing desegregation. . . [T]he court has examined every detail in each proposal to ensure that the components we order are necessary to repair the effects of past segregation, assure a successful desegregation effort and minimize the possibility of resegregation." (PA 117a). With respect to each component of ancillary relief, the district court made specific findings of their necessity under these standards. PA 127a (reading), 128a (in-service training), 129a (counseling and career guidance), 130a (testing).

The State defendants and Detroit Board appealed this judgment insofar as it required the State defendants and Detroit Board to "equally bear the burdens" of the "excess cost imposed by the provision" (PA 146a-147a) requiring these defendants jointly to implement the ancillary desegregation relief of remedial reading, in-service training, testing, and counseling and career guidance.

D. The Judgment of the Court of Appeals

In resolving the numerous appeals and cross-appeals of the parties, the Court of Appeals affirmed, modified, reversed, and vacated various parts of the district court's orders, remanding for further proceedings not inconsistent with its opinion. In summary, the Court of Appeals

[11] The district court apparently resolved the sharing of costs and administration of these magnet vocational centers to the satisfaction of the State defendants and the Detroit Board. PA 117a-119a. Contrary to State Petitioners' suggestion (Brief at 12 n.8), however, there can be no question that this was an aspect of desegregation relief, both direct and ancillary. *Compare* PA 76a-78a, 118a, n.5 *with* 20 U.S.C. §§ 1701 *et seq.*

held that the defendant school authorities and the district court totally failed to justify the exclusion of over 100 all-black schools in three administrative regions from the pupil reassignment plan. As these schools and regions were among those "most affected by the acts of *de jure* segregation" (PA 163a), the Court of Appeals held that under *Swann* v. *Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971), defendants bore the burden of justifying their maintenance as one-race schools; and that they had totally failed to explain the continuation of such *de jure* segregation (PA 163a-164a). The Court of Appeals affirmed the other portions of the plan for pupil reassignments (PA 167a) and affirmed the equitable authority of the district court to order staff desegregation (but vacated for the hearing of additional evidence on the issue (PA 181a-182a)). No party seeks review of these judgments in this Court.

With respect to the issues concerning the four particular "educational components" before this Court for review, the Court of Appeals held that the district court's findings of fact concerning their necessity as essential parts of an effective remedy providing complete relief were "not clearly erroneous, but to the contrary [were] supported by ample evidence." PA 170a. After reviewing the record and the precise claims of error presented by the parties, the Court of Appeals held that the in-service and testing components were essential to insure that staff can "work effectively in a desegregated environment" and that "students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools." PA 170a. Similarly, the Court of Appeals "agree[d] with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation." PA 170a. The Court of Appeals concluded (PA 171a):

> [T]he findings of the District Court as to the Educational Components are supported by the record.

> This is not a situation where the District Court "appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution." *See, Keyes* v. *School District*, 521 F.2d 465, 483 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3399 (U.S. Jan. 12, 1976).

The Court of Appeals also rejected State defendants' claim of immunity from sharing in the actual costs of implementing this ancillary relief. In essence, the Court of Appeals held that the order requiring State defendants to bear a share of the costs of implementation was in form and in actual effect an ancillary consequence of implementing prospective injunctive relief and, under *Edelman* v. *Jordan*, was therefore not barred. PA 172a-178a. Reviewing the State defendants' substantial contribution "to the unlawful *de jure* segregation that exists" in the Detroit Public Schools, the State defendants' sharing in other costs incident to pupil desegregation (e.g., acquisition of buses and construction of magnet vocational centers), and the relative resources of the State and local defendants, the Court of Appeals found no abuse of discretion in the district court's order requiring the State and local defendants to share equally in the cost of implementing ancillary relief. PA 178a-180a.[12]

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[12] The Court of Appeals added:

> Our affirmance of the District Court on this issue is not intended as a mandate for a cutback in essential educational programs [in the Detroit Public Schools] in order to meet the expenses of implementing the desegregation plan. We affirm that part of the judgment relating to the costs of the plan, but without prejudice to the right of the District Court to require a larger proportional payment by the State . . . if found to be required by *future developments*.

PA 180a (emphasis added). Yet the State defendants claim that it is *just* this supposed "judicially decreed blank check, to be filled in and drawn upon the Treasury of the State . . . to pay for court-ordered educational program expansion, that is before this Court for review." State Petitioners' Brief at 17. Such hyperbole does not fit the actual judgment which *is* before this Court for review. First, this supposed "judicial decree [*sic*]" is mere *obiter dictum* concerning some possible hypothetical "future developments" which have not yet occurred and, therefore, have not yet been fully plumbed by the record nor made the subject of any injunction, order, or decree. Second, no "blank check" for any "court-ordered educational program expansion" was contemplated by the Court of Appeals; to the contrary, only a portion of the "excess costs," the actual *increase* in costs from present programs incident to implementation of ancillary relief necessary to remedy the violation, was approved by the Court of Appeals. There will be time enough to argue this supposed "blank check" issue if the *dictum* is ever reduced to an order. Upon a proper showing, however, we have no doubt that there is substantial support for the proposition that educational services may not be substantially reduced as a result of desegregation, at least during the transition to a unitary system of schooling. *See, e.g., Griffin* v. *Prince Edward County School Board*, 377 U.S. 218 (1964) and *Adams* v. *Rankin County Board of Education*, 485 F.2d 324, 327-28 (5th Cir. 1973).

Following Justice Stewart's denial of the State defendants' application for a stay on September 1, 1976, the defendant State Treasurer paid over to the Detroit Board the State defendants' share of the projected implementation costs of ancillary relief. On November 15, 1976, this Court granted State defendants' petition for writ of certiorari to review the judgment of the Court of Appeals concerning the propriety of ancillary relief and the State defendants' sharing in the cost burdens of its implementation.

SUMMARY OF ARGUMENT

Plaintiffs appear as Respondents in this Court to defend the judgment of the Court of Appeals on several alternative grounds, some of which were not considered or relied upon by the courts below. Pursuant to the settled practice of this Court, we do this to assist review of a judgment which is correct and raises neither the spectre nor the issue of destroying any sovereignty enjoyed by the State Petitioners under present interpretations of the Constitution and laws of the United States. Contrary to the State Petitioners' claim that the judg-

ment below constitutes a federal judicial raid on the State treasury, the issues actually raised although important are much narrower and discrete. (*See* Introduction, pp. 21-23, *infra*).

1. For purposes of analysis, we first address the issue of plaintiffs' right to relief ancillary to actual pupil reassignments wholly apart from any order compelling State Petitioners to participate in such relief. A review of prior decisions and the record, including the State defendants' representations to the district court, shows that non-discriminatory testing and counseling, in-service training, and remedial reading are necessary and justified in this case to overcome the continuing consequences of the long-standing and pervasive *de jure* segregation violation and to assure a smooth transition now and effective maintenance hereafter of a racially non-discriminatory public school system. Thus, the State Petitioners entirely misconceive the need for an independent "educational" violation as a prerequisite for ordering such relief as an adjunct to pupil desegregation. (*See* Argument I, pp. 24-29, *infra.*)

2. Assuming *arguendo* that the ancillary relief ordered is proper, we next consider the issue of federal judicial power to compel responsible State officials to participate in providing such relief generally, without regard to the particular money consequences. A review of the prior decisions and the record will show that the courts below had the constitutional power—notwithstanding principles of federalism, and the tenth and eleventh amendments—to order the State Petitioners as active constitutional tort-feasors in the *de jure* violation to participate in implementing relief. State Petitioners may be ordered to take action beyond or in derogation of their authority and duty under State law in order to effectuate relief. (*See* Argument II, pp. 30-34, *infra.*)

3. We then examine directly whether State Petitioners are immunized under the eleventh amendment from

the particular participation here ordered, which includes sharing in any cost burdens incurred in implementing the ancillary relief. There are a number of alternative grounds, each of which shows that the eleventh amendment does not bar the State Petitioners from sharing in these costs. Although this may have an impact on the State treasury, the cost aspect of the relief is a consequence of complying with a prospective injunctive decree and not a payment of an accrued monetary liability by the State. Under *Edelman* v. *Jordan* and *Ex parte Young*, therefore, the eleventh amendment does not apply to this form of relief. Assuming, *arguendo*, that the eleventh amendment might apply, there are two alternative grounds upon which the Court's prior decisions show that any immunity of Petitioner State Board of Education has been lifted or waived. First, Congress has specifically authorized federal courts to entertain suits against state boards of education for such ancillary relief in school desegregation cases. 20 U.S.C. §§ 1703(a) (b) (f), 1706, 1720 (and 881(k)). Under *Fitzpatrick* v. *Bitzer*, the State Board has thereby been deprived of any immunity it might otherwise possess. Second, by state statute, and perhaps its own conduct, Petitioner State Board of Education has waived immunity to this suit.

There are several additional, alternative grounds which sustain the power of the lower courts here to order the relief with cost consequences against State Petitioners in the face of their claim of sovereign immunity. However, these grounds raise substantial constitutional or jurisdictional issues never previously resolved by this Court relating to the direct impact of section 1 of the fourteenth amendment, 28 U.S.C. § 1331, 42 U.S.C. § 1983 and other Reconstruction statutes, and *Ex parte Young* on claims of State sovereignty; and they implicate as well the vitality of *Hans* v. *Louisiana* with respect to federal-question determinations concerning *de*

jure racial discrimination. We believe the Court should not address these questions in this case unless it cannot agree to sustain the judgment below against claims of sovereign immunity on the several other alternative grounds suggested above. Even then, we respectfully submit that this Court's prior practice counsels that these monumental issues not be resolved prior to remand to the Court of Appeals for initial determination of its views or additional briefing and reargument in this Court on these subjects. (*See* Argument III, pp. 34-44, *infra.*)

4. Finally, assuming *arguendo* the propriety of ancillary relief and the constitutional power of the courts below to order the State Petitioners to share in the implementation costs, we address the non-constitutional issue of whether the lower courts abused their equitable discretion in the particular circumstances present here. A review of the record will show that the lower courts, particularly the Court of Appeals, were solicitous of State policy in framing relief. Thus, for example, the orders directing acquisition and payment for buses, a monitoring commission, and magnet vocational schools were conformed to State practice and are not at issue in this Court. However, State policy was appropriately modified to the extent of requiring State Petitioners to bear a share of the costs of implementing a portion of ancillary relief, given the relative resources and violations of the parties defendant and the alternatives available. Although State Petitioners made no claim of error in the Court of Appeals and make none in this Court on the amount assessed, it may still be appropriate to remand to the district court for hearings to allow State defendants to make a record to insure that the actual costs previously assessed against State defendants do not exceed their share of the costs which have been incurred in implementing appropriate ancillary relief over the past year. (*See* Argument IV, pp. 44-49, *infra.*)

ARGUMENT

INTRODUCTION

Plaintiffs Ronald Bradley, et al., appear as Respondents in this Court to defend that portion of the judgment of the Court of Appeals here put in issue by the State Petitioners. That judgment requires the Detroit Board and State defendants to implement four aspects of relief ancillary to actual pupil reassignments:

1. Remedial reading, which is necessary (a) to begin to overcome the continuing, harmful educational effects of the *de jure* segregation on the plaintiff school children, and (b) to insure that the transition to desegregated schooling is effective (PA 170a; 127a; 72a).

2. Non-discriminatory guidance and counseling which is essential for a school system undergoing desegregation in order (a) to overcome the residual effects of the *de jure* segregation which would limit the educational opportunities of black students and taint the attitudes of all students, and (b) to encourage all students to participate in a non-discriminatory and non-segregated fashion in the various magnet and vocational schools and programs designed to alleviate the *de jure* segregation (PA 170a; 128a-129a; 81a).

3. In-service training for staff, which is necessary (a) to enable them to cope with the transition to desegregated schools, and (b) to overcome their own racial attitudes which have been tainted by the *de jure* segregation experience (PA 170a; 128a; 73a).

4. Non-discriminatory testing, which is necessary to insure that black students (a) are not penalized in their present schooling for the harmful effects of the prior *de jure* segregation or by the continuing racial bias inhering in the testing program

of the Detroit Public Schools, and (b) are not resegregated from whites in separate educational programs during the desegregation process (PA 170a; 130a; 78a-79a).

At almost every page of their Brief, however, State Petitioners challenge the requirement that they "bear equally [with the Detroit Board] the burdens of . . . excess cost imposed" (PA 147a, 169a) in implementing the decree. *See* Brief at 16-17, 23-39. This fixation on the dollar consequences of injunctive relief hides rather than reveals the real interests and issues at stake. Thus, for example, the issue of whether relief ancillary to pupil desegregation is appropriate has, in the first instance, nothing to do with which parties are to be enjoined to provide such relief. Rather, the issue is whether plaintiffs are entitled to such ancillary relief at all. Yet at the outset of State Petitioners' argument on this issue (Brief at 17), they rail against the "judicially decreed blank check" on the state treasury.

As another example, the propriety of ordering the State defendants to provide such ancillary relief jointly with the Detroit Board includes two discrete questions: First, is there constitutional power to order state-level constitutional tort-feasors to provide injunctive relief jointly with local defendants? Second, if so, do the State defendants enjoy some special immunity from sharing in any fiscal consequences of implementing injunctive relief? But State Petitioners focus their argument (Brief at 23-37) almost exclusively on their asserted immunity from supposed federal judicial raids on the State treasury.

As a final example, assuming the *power* of the courts below to enter the order challenged here, there is still a non-constitutional issue: what equitable considerations should guide the shaping of the injunction when State fiscal policy or administrative practice come into con-

flict with such complete relief? Yet State Petitioners in their Brief bury such non-constitutional considerations in their quest for blanket protection.

We therefore urge this Court to review the discrete and much narrower issues actually presented rather than State Petitioners' rhetorical assertions. As will be shown in Argument hereafter, this will allow the Court to review, and to sustain, the judgment below without implicating the monumental constitutional issues expressly left unresolved by this Court since the adoption of the Civil War Amendments and the ensuing Reconstruction Legislation.

This narrower approach is particularly appropriate in the circumstances of this case where the non-judicial conduct of the district judge (*see* note 9 and discussion, *supra*, pp. 12-13) has prevented the making of a full record, even though State Petitioners make no claim of procedural error. Plaintiffs therefore appear here as Respondents not to defend the procedures of the district court, but to defend the judgment of the Court of Appeals based on the substantial evidentiary support for the particular ancillary relief at issue. A review of the evidence shows the propriety of ancillary relief in school desegregation cases such as this.

In support of the judgment, plaintiffs also urge several grounds "whether or not that ground was relied upon or even considered by the [lower] court." *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n. 6 (1970). *See also United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924); *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931). Application of this settled approach to appellate review will materially assist the Court in deciding this case based on existing precedent without reaching the unresolved constitutional issues on which State defendants and the State *amici* seek a final, and in our view constitutionally destructive, advisory opinion.

I.

RELIEF ANCILLARY TO PUPIL DESEGREGATION IS APPROPRIATE BECAUSE ESSENTIAL TO REMEDY THE CONTINUING HARMFUL EFFECTS OF THE *DE JURE* SEGREGATION VIOLATION AND OTHERWISE TO INSURE THE TRANSITION TO AND MAINTENANCE OF A RACIALLY NON-DISCRIMINATORY DETROIT PUBLIC SCHOOL SYSTEM.

State Petitioners' broadside at all relief ancillary to actual pupil reassignments is unwarranted given the record below and settled case law. As Petitioners would have it, the remedy for a long and pervasive history of almost total, *de jure* segregation is limited exclusively to pupil reassignments—regardless of the proof concerning the harmful effects of such state-imposed segregation on the educational opportunities of plaintiff children, of the record showing the need for ancillary relief to insure an effective transition to a non-discriminatory system of pupil attendance and schooling, and of the other evidence concerning aspects of racial discrimination already existing in the school district or likely to appear during the desegregation process. *See* Statement, *supra*, at notes 2, 4, and 8, and accompanying text.[13]

The Petitioners' novel view would also disregard the traditional equitable authority and duty of the federal

[13] The sweep of Petitioners' challenge to the authority of the chancellor sitting in equity to order any necessary relief beyond pupil reassignments may result solely from their concerns about the State treasury rather than the propriety of such ancillary relief. For that reason, it may be helpful for purposes of analysis to consider the propriety of the ancillary relief apart from the State sovereignty claims by assuming, *arguendo*, that the injunction runs only against the Detroit Board. *Cf. Mt. Healthy City School District* v. *Doyle*, 45 U.S.L.W. 4081 (U.S. Jan. 11, 1977) (school district "not entitled to assert any Eleventh Amendment immunity from suit in federal courts.")

courts to root out the violation by rendering "a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *United States* v. *Louisiana*, 380 U.S. 145, 154, 156 (1965). "For it is the historic purpose of equity to 'secur[e] complete justice,' *Brown* v. *Swann*, 10 Pet. [U.S.] 497, 503 (1836)." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). This principle of "complete justice" has always guided federal equity courts:

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant necessary relief.

Bell v. *Hood*, 327 U.S. 678, 684 (1946). *See also Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-98 (1946); *Brown II*, 349 U.S. 294, 300-01 (1955); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575-78 (1972). And the burden is on the discriminator not the victim to show that the injury and harm reasonably feared to result from the discrimination did not in fact occur, at least for purposes of insuring that the continuing harmful effects of the violation are remedied.[14] Once plaintiffs have proven a substantial violation, doubts about what remedies will provide effective and lasting relief should be resolved in favor of the victims rather than the perpetrators of the unlawful conduct.[15]

In the face of the uncontroverted evidence and settled principles of equity, State Petitioners argue that, because

[14] *E.g., Franks* v. *Bowman Transp. Co.*, 44 U.S.L.W. 4356, 4363 (U.S. 1976); *cf. Keyes* v. *School District No. 1*, 413 U.S. 189, 211 (1973).

[15] *E.g., Ford Motor Co.* v. *United States*, *supra*, 405 U.S. at 575; *Zenith* v. *Hazeltine*, 395 U.S. 100, 123-24 (1969); *United States* v. *E. I. Dupont de Nemours Co.*, 366 U.S. 316, 334 (1961); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265 (1945); *Story Parchment Co.* v. *Patterson Paper Co.*, 282 U.S. 555, 563 (1931).

the only violation found in the first violation opinion was *de jure* pupil segregation, *Milliken* and *Swann* limit the remedy solely to pupil reassignments. In support of this argument, State Petitioners (Brief at 18) parrot the phrase that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *Milliken*, 418 U.S. at 744. Thus, under State Petitioners' wooden view of violation and remedy, the courts below lacked authority to order *any* relief ancillary to pupil reassignments because "there has not been any adjudicated constitutional violation with respect to educational programs in the Detroit school system." Brief at 18.

Yet State defendants' own conduct and evidence belie this unprecedented argument. First, State defendants have acquiesced and assisted in implementing other "ancillary relief" ordered in this case—construction of vocational centers, acquisition of and payment for buses, and operations of a monitoring commission. *See* Statement, *supra*, at pp. 13-14; and State Petitioners' Brief at 8 and 11-12. Second, the managing agent of State defendants, offered as their expert, readily admitted at trial that the four aspects of ancillary relief here at issue were either "required" or "deserve some special emphasis" in implementing a pupil desegregation plan and may otherwise serve as a vehicle for beginning to "repair damage done by segregation." A 85-97. Indeed, given the State defendants' experience with such ancillary relief in the many other school desegregation cases in Michigan and the testimony of administrators from a Title IV school desegregation center that such ancillary relief is regularly included as part of the relief in school systems undergoing desegregation, the Petitioners' argument is, literally, incredible. They have *no* basis for implying (Brief at 20-21) that in the twenty-two years since *Brown*, such ancillary relief has had no place in the school desegregation process. Thus, State defendants' admissions and experience, as well as the substantial evidence, support the holding of the courts below that such ancillary relief is necessary to remedy the continuing consequences of the violations found, and is essential in the transition to a racially non-discriminatory system of schooling.

This conclusion is also supported by case law, express congressional authorization, and HEW regulations. First, courts have regularly included such ancillary relief in desegregation decrees in order (1) to eradicate the residual resource and educational opportunity discriminations, as well as the continuing harm resulting from the primary pupil segregation violation, and (2) to insure the effective implementation of pupil desegregation and transition to effective racial non-discrimination in public schooling.[16] Such essential ancillary relief is included in school desegregation decrees precisely because it *is* "designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken*, 418 U.S. at 746.

Second, Congress and HEW have on several occasions analyzed the need for precisely such ancillary relief to insure effective desegregation. They have not only found it essential, but have provided funding and technical assistance to state and local educational agencies for that purpose. *See, e.g.*, Emergency School Aid Act, 20 U.S.C.

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[16] *E.g.*, *Morgan* v. *Kerrigan*, 401 F. Supp. 216, 231, 234-35 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976); *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), 380 F.2d 385 (5th Cir. 1967); *Plaquemines Parish School Bd.* v. *United States*, 415 F.2d 817 (5th Cir. 1969); *United States* v. *Texas*, 330 F. Supp. 235 (E.D. Tex. 1971); *Lee* v. *Macon County Board of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), 317 F. Supp. 103 (M.D. Ala. 1970); *United States* v. *Missouri*, 523 F.2d 885, 887-88 (8th Cir. 1975). *Cf. Gaston County* v. *United States*, 395 U.S. 285 (1969) and *Swann*, 402 U.S. at 18-20; *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 465 (1972); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 571 (1974); *Rogers* v. *Paul*, 382 U.S. 198 (1965).

§§ 1601 and 1606(a); 45 C.F.R. §§ 180.12, .31, .41; 42 U.S.C. §§ 2000c-2 and c-4; 45 C.F.R. § 185.12(a) (reprinted in Appendix B attached hereto).[17] Congress and HEW, like the courts, have thus expressly recognized that the elimination of *de jure* pupil segregation requires more than just pupil reassignments to be effective in beginning to overcome the harm inflicted by the violation as well as to insure the transition to racially non-discriminatory schooling.

The point of this judicial, congressional, and administrative authority is not to give federal judges a roving commission to order general improvements in the education offered students in school districts found guilty of *de jure* segregation. Due at least in part to the critical examination given the Detroit Board's initial proposals by the plaintiffs (and by the State defendants), plaintiffs (and this Court) can be certain that the ancillary relief contemplated by the parties and the district court prior to the district judge's remarkable exclusion of plaintiffs from further proceedings (*see* note 9, *supra*) was carefully limited to the equitable tasks at hand—to remedy the harmful effects and residual discrimination inhering in the *de jure* segregation violation, to overcome the other racial discriminations in schooling of record, and to assist the transition to a racially non-discriminatory system of schooling. And the Court of Appeals was

[17] *See also* 116 CONG. REC. 18109-10 (1970); S. REP. 92-61 at 8, 13 (1971); H. REP. 92-576 at 5, 13 (1971); *Toward Equal Educational Opportunity*, Report of the Select S. Comm. on Equal Educational Opportunity, 92 Cong., 2d Sess. at 129-40, 233-37 (1972) (Comm. Print). *Cf.* Equal Educational Opportunities Act of 1974, particularly 20 U.S.C. §§ 1703(a)(b)(f) and 1713(a). It is also relevant that two of the most experienced professionals from one of the authorized Title IV School Desegregation Centers carefully examined the ancillary relief here at issue to insure that its purposes, programs, and costs were limited to essential adjuncts of the pupil desegregation relief rather than providing only generally improved educational opportunities. *See* note 8, *supra*.

thereafter careful to insure that the ancillary relief as finally decreed does *not* present "a situation where the District Court appears to have 'acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.' *See, Keyes* v. *School District*, 521 F.2d 465, 483 (10th Cir. 1975)." PA 171a.

Aside from presenting a stone wall to the ancillary relief here, State Petitioners therefore offer *no* reason, authority, nor record evidence to suggest any abuse of equitable discretion or excess of judicial authority in the relief ordered by the lower courts.[18] To put the point bluntly, State Petitioners' challenge to the authority of the courts below to order any ancillary relief is naught but a frolic or detour on the way to consideration of their primary claim that *they alone* among the culpable defendants should be free from judicial compulsion to implement such manifestly appropriate relief.

[18] Thus, State defendants do *not* argue, for example, that special remedial reading is not necessary to overcome the lingering harmful effects of the *de jure* segregation on the educational opportunity plaintiff school children will enjoy during desegregation; that non-discriminatory testing, guidance and counseling are unrelated to avoiding incorporation of these same harmful effects, other racial bias, and resegregation in the black school children's enjoyment of the diverse magnet, vocational and other educational programs of the Detroit School District; that special in-service training of staff is not an integral part of the transition process during pupil desegregation. It is also relevant that the Detroit Board has conceded the independent violations of educational opportunity and resource discrimination along racial lines which is supported by the record evidence. *See, e.g.*, Detroit Board Brief in Opposition to Certiorari, at 9; and Statement, *supra*.

II.

APART FROM THE COST IMPACT, THERE IS *NO* TENABLE CLAIM THAT CONSTITUTIONAL PRINCIPLES OF FEDERALISM, THE TENTH OR ELEVENTH AMENDMENT BAR STATE DEFENDANTS' PARTICIPATION IN IMPLEMENTING THE APPROPRIATE ANCILLARY RELIEF.

For purposes of analysis, we assume in this Argument II that the ancillary relief ordered below was proper, and we consider only those aspects of State Petitioners' claim of absolute immunity which do not involve the cost impact of implementing the relief.[19] In subsequent sections, we shall consider the cost impact (*see* Argument III), as well as the non-constitutional factors which may guide equitable discretion assuming judicial power (*see* Argument IV). Although the statement of the question in this fashion seems to render the answer constitutionally obvious, we believe this approach is analytically required because State defendants' claim of sovereign immunity seems to involve *more* than just an eleventh amendment claim of protection from damage awards and related money judgments. Thus, for example, Petitioners do not here challenge the lower courts' authority to order them to share substantially in the large cost of buses, to provide monitoring services, and to implement the magnet vocational centers, at least so long as those orders conform to State defendants' view of State policy and practice. *See* Petitioners' Brief at 8 n. 6, 11-12 n. 8; also Statement, *supra*, notes 7 and 11.

The *power* of the lower courts to enjoin State Petitioners to assist in implementing appropriate injunctive

[19] We do not deal with mere fictions, however, for the form of the lower court's decree could just as easily have ordered that State defendants implement the in-service and testing components alone rather than joinly with the Detroit Board and thereby avoid altogether mention of the costs of implementation.

relief cannot be seriously doubted once it is remembered that these defendants, and the State of Michigan, were previously adjudicated to have contributed substantially to the *de jure* segregation of the Detroit Public Schools. *Bradley* v. *Milliken*, 338 F. Supp. at 589, 484 F.2d at 238-242, 418 U.S. at 734-35 n. 16. *See also Hills* v. *Gautreaux*, 425 U.S. 284, 298 n. 13 (1976). These violation findings were manifestly correct, and State defendants have not challenged them here. Given this fourteenth amendment violation, *Ex parte Young*, 209 U.S. 123, 159-60 (1908), provides the complete rationale, albeit an historic "fiction," by which the federal courts may order injunctive relief against the State officials here to remedy the violation and its effects. As stated by Mr. Justice Rehnquist for the Court in *Edelman* v. *Jordan*, 415 U.S. 651, 664 (1974), the *Ex parte Young* "holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."

Yet the State defendants seem to suggest that the "sword" provided in *Ex parte Young* has been removed *sub silentio* by the Court's recent interpretations of the tenth amendment and "principles of federalism" in *National League of Cities* v. *Usery*, 49 L.Ed.2d 245 (1976) and *Rizzo* v. *Goode*, 423 U.S. 362 (1976). *See* Petitioners' Brief at 26-31. This constitutionally revolutionary assertion will not withstand scrutiny.

First, the tenth amendment holding in the opinions for the five-member majority of the Court in *National League of Cities* v. *Usery* is that Congress may not wield its power under the Commerce Clause to enact statutes which "impair the state's ability to function effectively within a federal system," 49 L.Ed.2d at 257, so as to "devour the essentials of state sovereignty," 49 L.Ed.2d at 259—unless, of course, "the federal interest is demonstrably greater" under a "balancing approach," 49 L.Ed.

2d at 260 (Blackman, J., concurring). It is inconceivable that this decision was intended to modify without mention the long-standing constitutional power and equitable authority of federal courts under *Ex parte Young* to order state officials found to have violated the fourteenth amendment to implement otherwise appropriate injunctive relief to remedy the violation and all its consequences. Speaking for the Court, Mr. Justice Rehnquist said nothing to intimate that this traditional "sword" of federal judicial authority under *Ex parte Young* to redress particular denials of the fourteenth amendment was suddenly to be sheathed in the face of the tenth amendment. The tenth amendment has, after all, been coexisting with, but without impeding the reach of, the Civil War amendments for over a century of Constitutional Union and Supreme Court decisions.

Second, the "principles of federalism" cited in *Rizzo*, 423 U.S. at 380, do not abrogate the constitutional *power* of a federal court to enjoin state officials to remedy their own violations of the fourteenth amendment. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 238-41 (1976). For in *Rizzo*, the Court found that the injunctive relief decreed by the lower courts ran against city officials who had not themselves committed any constitutional violation, 423 U.S. at 376, 378. Here, in contrast, there is *no* question that State defendants participated directly in the constitutional violation of *de jure* segregation; and, assuming that Argument I *supra*, is correct, there is no question that the State defendants have been enjoined to redress the violation and its effects not to "fashion prophylactic procedures . . . to minimize misconduct on the part of a handful of employees." 423 U.S. at 378. Like *Usery*, Mr. Justice Rehnquist's opinion for the Court does not suggest that *Rizzo* limits the *power* of the federal judiciary, upon a proper showing, to order state officials under the doctrine of *Ex parte Young* to

redress their violations of the fourteenth amendment.[20] *Cf. Hills* v. *Gautreaux*, 425 U.S. 284, 293-300 (1976).

Finally, *Rizzo* and *Usery* do not purport to alter in any way the traditional *power* of federal courts to order action which exceeds or is in derogation of otherwise constitutionally valid state policy or practice where necessary to provide relief from constitutional violations. The settled law of this Court, consistently followed by the lower courts, is that otherwise valid state law or policy must yield or may otherwise be suspended to the extent necessary to provide complete relief, even if the state policy or practice does not constitute an "independent constitutional violation."[21] This federal judicial power to enjoin state officials to provide necessary relief inheres in the Supremacy Clause and the fourteenth amendment which further limits State sovereignty. *See Ex parte Virginia*, 100 U.S. 339, 346-48 (1880); *Ex parte Young, supra*, 209 U.S. at 159-60; *Fitzpatrick* v. *Bitzer*, 49 L.Ed.2d 614, 620-22 (1976); *Edelman* v. *Jordan*, *supra*, 415 U.S. at 664.

Thus, the general power of the lower courts to enjoin State defendants to participate in implementing relief cannot be seriously questioned here. We turn then to

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[20] Argument IV, *infra*, considers the issue of how equitable, nonconstitutional considerations may guide or limit the use of this constitutional power in light of state policy and practice and principles of federalism.

[21] *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 459 (1972). *See also, e.g., United States* v. *Scotland Neck*, 407 U.S. 484, 488-89 (1972); *North Carolina* v. *Swann*, 402 U.S. 43, 45 (1971); *Griffin* v. *County School Board*, 377 U.S. 218 (1964); *Brown II*, 349 U.S. at 300-301; *United States* v. *Greenwood Municipal School District*, 406 F.2d 1086, 1094 (5th Cir. 1969); *Haney* v. *County Bd. of Educ.*, 429 F.2d 364, 368-69 (8th Cir. 1970); *Carter* v. *Gallagher*, 452 F.2d 327, 328 (8th Cir. 1971); *United States* v. *Mississippi*, 339 F.2d 679, 684 (5th Cir. 1964); *United States* v. *Duke*, 332 F.2d 759, 769-70 (5th Cir. 1964); *Gautreaux* v. *City of Chicago*, 480 F.2d 210, 214 (7th Cir. 1973).

the common denominator of State Petitioners' claims, i.e., that they are immunized from participating in implementing such appropriate ancillary relief because a consequence is that it will cost the State treasury money.

III.

THE ELEVENTH AMENDMENT DOES NOT IMMUNIZE STATE DEFENDANTS FROM BEING REQUIRED TO IMPLEMENT JOINTLY WITH THE DETROIT BOARD THE PROSPECTIVE ANCILLARY RELIEF, INCLUDING SHARING IN THE COSTS OF IMPLEMENTATION.

In this section we consider the State Petitioners' argument that their sovereign immunity operates to shield them from sharing in the costs of implementing ancillary relief. We believe this absolute immunity issue should be resolved by reference to decisions construing the eleventh amendment. For decisions concerning general "principles of federalism" and the tenth amendment address either more general, non-monetary relationships concerning the supremacy of Federal authority vis-a-vis State sovereignty (*see* Argument II, *supra*) or the proper exercise of equitable discretion assuming the Federal judicial power to compel the State to act (*see* Argument IV, *infra*).

A. The Judgment Below Is Not Barred by the Eleventh Amendment Because the Impact on the State Treasury Is a Consequence of Complying with Prospective Injunctive Relief.

As this Court noted in considering the order requiring Illinois to make retroactive payment of wrongfully withheld welfare monies in *Edelman* v. *Jordan*, 415 U.S. at 667, "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day." In *Edelman*, however, the Court articulated the nature of the difference. The eleventh amendments bars "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury," 415 U.S. at 663, that is, "a suit which seeks the ["retroactive"] award of an accrued monetary liability which must be met from the general revenues of a State," *id.* at 664, even if "labeled 'equitable' in nature," *id.* at 666.

In contrast, *Ex parte Young* permits "prospective" relief against States and their officials "to conform [their] future conduct . . . to the requirement[s] of the Fourteenth Amendment," 415 U.S. at 664, even if that relief has "greater impact on state treasuries," *id.* at 667. This "ancillary effect on the state treasury" is not barred by the eleventh amendment to the extent such "fiscal consequences [are] the necessary result of compliance with decrees which by their terms [are] prospective in nature," *id.* at 667-68. Thus, this Court in *Edelman* held that the eleventh amendment barred an order requiring Illinois State officials to make retroactive payments of previously withheld welfare checks; the order was "in practical effect indistinguishable in many aspects from an award of damages against the state. . . . [It was] measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* at 668.

Applying these criteria to this case, it is as clear as most days that the relief sought and ordered below is permitted under *Ex parte Young* rather than barred by the eleventh amendment. First, this suit has always sought (and still seeks) a racialy non-discriminatory system of schooling for plaintiff children now and hereafter not money damages or other retroactive payments for an accrued monetary liability. Second, the injunctive decree against State Petitioners is prospective in nature;

it requires compliance, now and hereafter, with the command of *Brown II*, 349 U.S. at 301, to operate a racially nondiscriminatory school district, free of the vestiges of *de jure* segregation. PA 178a.

These two factors distinguish this decree from the retroactive payments in *Edelman* and show that the prime thrust of the decree here is to provide traditional, prospective, injunctive relief under *Ex parte Young* which is not barred by the eleventh amendment.[22]

State Petitioners nonetheless apparently argue that the shadow of the eleventh amendment falls over this case because the decree includes a provision requiring that State and local defendants "shall . . . equally bear the burdens" of the costs of their joint implementation of relief.[23] State Petitioners claim that this constitutes a direct raid on the State treasury barred by the eleventh amendment. Brief at 31, *et seq.* The fallacy in this approach can be most easily seen by assuming for purposes of analysis that the decree, instead of requiring such joint implementation of ancillary relief, ordered each set of defendants to implement two of the "components" separately. *Cf.* note 19, *supra.* Such a decree might be subject to a challenge on grounds of an abuse

[22] Describing the prospective as contrasted to the retroactive nature of such ancillary relief, Judge Garrity in the Boston school case noted that plaintiffs do not seek relief which would make them whole and compensate them as a class, with money damages or other compensatory relief, for the "immense injury . . . already wrought by the defendants' long practiced racial discrimination." *Morgan* v. *Kerrigan, supra,* 401 F. Supp. at 231 and n.5. Rather, "the remedy . . . assures that past discriminatory practices will work no further harm," *id.* at 231, by including measures, *inter alia,* to eliminate "the persisting effects of past discrimination." *Id.* at 234.

[23] This provision apportioning implementation costs also guarantees that these costs will be strictly limited to the ancillary relief actually ordered by the court rather than include costs incident to services, programs, or personnel already budgeted by the Detroit School District independent of the decree. PA 146a.

of equitable discretion (*see* Argument IV, *infra*) but it most certainly would not be barred by the eleventh amendment. For the equally large costs of such direct implementation then borne by the State defendants would obviously have only an "ancillary effect on the state treasury"; such "fiscal consequences [would be] the necessary result of compliance with [a] decree which by [its] terms [is] prospective in nature." *Edelman* v. *Jordan,* 415 U.S. at 667-68.

Viewed in this light, the portion of the decree requiring the State defendants to share equally with the Detroit Board in the costs of joint implementation merely apportions these fiscal consequences of future compliance with a prospective decree between State and local defendants. This mere apportionment of any implementation costs surely does not serve to make what is otherwise manifestly a permissible ancillary effect on the State treasury into a retroactive payment for an accrued monetary liability barred by the eleventh amendment.[24] Thus, the decree "requires payment of state funds . . . [only]

[24] In posing this hypothetical decree for purposes of analysis, we are not asking the Court to judge an award which might have been tailored differently than the one actually made in this case. *Cf. Edelman* v. *Jordan,* 415 U.S. at 665-66. Rather the point of the hypothetical is to show that the decree actually made in this case merely apportions the ancillary effects on the State treasury which are otherwise permissible under *Ex parte Young* and not barred by the eleventh amendment. In so doing, it becomes clear that the eleventh amendment policy considerations which underlie the result in *Edelman* are not present here: there is no direct drain on the State treasury to reimburse (or provide "refunds" to) victims for past transgressions of the law but only such ancillary effect on State funds as is necessary to secure future compliance with the command of *Brown II* to insure the transition to and maintenance of a nondiscriminatory system of schooling. *Cf. Edelman* v. *Jordan,* 415 U.S. at 666 n.11; *Ford Motor Co.* v. *Dept. of Treasury,* 323 U.S. 459, 464 (1945). Indeed, for purposes of analysis under *Edelman,* there is no difference in kind or effect on the State treasury of these costs and those incurred with respect to the injunctive relief concerning buses, magnet vocational centers, and a monitoring commission, which State defendants have previously conceded is not barred by the eleventh amendment. *See* notes 7 and 11, *supra.*

as a necessary consequence of compliance in the future with a substantive federal-question determination" concerning complete relief from a *de jure* segregation fourteenth amendment violation, rather than "as a form of compensation to those" injured. 415 U.S. at 668.

The Court of Appeals properly rejected State defendants' claim to sovereign immunity in holding that the "order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of *de jure* segregation. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969)." PA 178a. *See also* PA 172a-173a.[25] Merely requiring the guilty parties to share the ancillary fiscal consequences of such prospective relief does not convert the remedy into an award of money damages nor render the decree retroactive.

B. In the Alternative, Congress Has Specifically Lifted Any Sovereign Immunity from This Suit Otherwise Enjoyed by the Defendant State Board of Education Pursuant to Congress' Enforcement Powers Under Section 5 of the Fourteenth Amendment; and, in Any Event, the State Has Specifically Waived Its Immunity to Suit Here.

1. Assuming, *arguendo*, that the eleventh amendment might apply to the decree here, any claim of sovereign immunity has been lifted by specific Act of Congress pursuant to its enforcement powers under section 5 of the fourteenth amendment. Congress has specifically authorized suit against the defendant State Board of Education for violations of the Equal Educational Opportunities Act of 1974 and provided federal courts with the jurisdiction to hear such cases. *See* 20 U.S.C. §§ 1703 (a), (b) and (f), 1706, 1708, and 1720 (also 20 U.S.C. § 881(k) which defines the term "state education agency" to include the State Board of Education) (reprinted in Appendix B attached hereto). Under *Edelman* v. *Jordan*, 415 U.S. at 672, and *Fitzpatrick* v. *Bitzer*, 49 L.Ed. 2d 614, 619-22 (1976), this congressional authorization to join the State Board of Education as a party defendant in causes of action under 20 U.S.C. § 1701, *et seq.*, lifts the immunity which might otherwise be enjoyed by the State, at least with respect to the Petitioner State Board of Education.

As the Court summarized in *Fitzpatrick*, 49 L.Ed.2d at 620-21, this is so becasue the Civil War Amendments constitute limitations on State sovereignty and sanction intrusions into the judicial, executive, and legislative spheres of autonomy previously reserved to the States and/or the people. The Court stated the controlling constitutional principle in *Ex parte Virginia*, 100 U.S. 339, 346-48 (1880):

> The prohibitions of the 14th Amendment are . . . restrictions of state power. It is these which Congress is empowered to enforce. . . . Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact . . . . [E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them . . . [T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the 14th Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits, it is complete.

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[25] This was the sole ground addressed by the Court of Appeals in rejecting State defendants' claim to sovereign immunity under the eleventh amendment. Although the alternative grounds discussed, *infra*, were not considered by the Court of Appeals, they nonetheless support the judgment below and are therefore properly before this Court for review. *See Langnes* v. *Green*, *supra*, 272 U.S. at 535-59, and cases cited in the Introduction to Argument, *supra*, p. 23.

As held by the Court in *Fitzpatrick*, "we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans* v. *Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." 49 L.Ed.2d at 621. Congress thus acted properly in 20 U.S.C. §§ 1701, *et seq.*, to authorize suit against the defendant State Board of Education even if "constitutionally impermissible in other [*i.e.*, non-section 5] contexts," 49 L.Ed.2d at 622, and thereby "abrogate[d] the immunity conferred by the Eleventh Amendment." 49 L.Ed. at 619.

The only remaining issues concern whether the Act should be used in deciding this appeal and whether its terms support the judgment below. First, under this Court's decisions culminating in *Bradley* v. *School Board*, 416 U.S. 696, 711-21 (1974), the provisions of the Act should be applied to decide a pending appeal such as this. The Act involves "great national concerns," *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801), not private disputes; and Congress did not limit the Act only to prospective effect. Therefore, the "court must decide according to existing laws." *Id.* Second, the findings and record below concerning the continuing *de jure* segregation violations and their harmful consequences on the educational opportunities of plaintiff children (*see* Statement, *supra*, pp. 5-7, 10-11), show that a cause of action has been made out against the Petitioner State Board of Eduction under 20 U.S.C. §§ 1703(a), (b) and (f).[26]

[26] It is also relevant that the drafters of 20 U.S.C. §§ 1701, *et seq.*, intended that such ancillary relief be included as remedies for *de jure* segregation violations. *See, e.g.*, 118 CONG. REC. 8928, 8930 (1972) (message of Pres. Nixon); Equal Educational Opportunity Act, hearings before the H. Comm. on Educ. & Labor, 92d Cong., 2d Sess. 10 (1972) (Sec'y Richardson). *See also*, 20 U.S.C. §§ 1703(f), 1706, 1713(g). Indeed such ancillary relief was hoped by many of the Act's sponsors to be a complete substitute for pupil reassignment beyond the schools in closest proximity to any child's residence; thus, these sponsors were not overjoyed when the Congress included a specific "savings clause," 20 U.S.C. § 1702(b), as well, in order to guarantee that the power of the federal courts to require pupil reassignments to secure compliance with *Brown* would *not* be limited or modified in any way. *See* 120 CONG. REC. S13349-85 (1974); 120 CONG. REC. H7389-7419 (1974); *Morgan* v. *Kerrigan*, 530 F.2d 401, 411-15, 419 n.24 (1st Cir. 1975); *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (6th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1976). This "savings clause" in what otherwise might have been "anti-busing" legislation was certainly appropriate for an Act purporting in name "to enforce" (rather than "in effect to dilute") the fourteenth amendment. *See Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n.10 (1966).

Thus, the ancillary relief ordered here against the State Board of Education, even if the equivalent of money damages for an accrued liability, is not barred by the eleventh amendment; for the State Board of Education has been expressly subjected to such suits by the Congress enforcing its power under the fourteenth amendment. *Fitzpatrick* v. *Bitzer*, 49 L.Ed.2d at 620-22.[27]

2. In the alternative, the State of Michigan has expressly waived the immunity to suit of the State Board of Education. Pursuant to MICH. STAT. ANN. § 15.1023 (7), the "state board of education may sue and be sued, plead and be impleaded in *all* courts *in* this state" (emphasis added). Although the courts below did not focus on the effect of this statute, the district court did in the Kalamazoo school case. *See Oliver* v. *Kalamazoo Board of Education*, —— F.Supp. —— (Nov. 5, 1976) (CA #K-88-71), appeal pending. Relying on *Soni* v. *Board of Trustees*, 513 F.2d 347, 352-53 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3702 (U.S. June 7, 1976), the

[27] As the parties did not focus and the Court of Appeals did not pass on this ground, "it may be appropriate to remand the case rather than deal with the merits of the question in this Court." *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970). On this particular issue, however, the Court's settled decisions in *Bradley* v. *School Board* and *Fitzpatrick* v. *Bitzer*, as well as the findings and uncontroverted record below, make the decision so obvious that remand to the Court of Appeals would serve no purpose.

Oliver court found in this statute an express waiver of sovereign immunity under the eleventh amendment. Recognizing that waiver of a State's immunity to suit in federal court must be express, *Edelman* v. *Jordan*, 415 U.S. at 673, the court found that the phrase "*all* courts *in* this state" had been advisedly used in contrast to, for example, "state courts" or "courts of this state." *Oliver*, slip op. at 6. Reviewing other Michigan statutes, cases, and practice, the court found *no* indication that this express waiver of immunity was intended to be limited to state courts. Thus, the district court in *Oliver* properly concluded that state law expressly waives any of the State Board of Education's immunity under the eleventh amendment from suits such as this. *Cf. Reagan* v. *Farmers Loan & Trust Co.*, 154 U.S. 362, 392 (1884). For the "consent to be sued inescapably subjects the [State Board] to the hazard of having a money judgment rendered against it." *Soni* v. *Board of Trustees, supra*, 513 F.2d at 353.[28]

C. In the Alternative, the Judgment Below Is Not Barred by the Claim of Sovereign Immunity Because Section 1 of the Fourteenth Amendment, Both in Its Direct Impact and as Enforced by Congress Through 42 U.S.C. § 1983, 28 U.S.C. § 1331 and Other Reconstruction Legislation, Supercedes the Eleventh Amendment.

As final alternatives, we come to other potential limitations of the State Petitioners' claim to sovereign immunity: passage of the fourteenth amendment itself and congressional enactment of 42 U.S.C. § 1983, 28 U.S.C. § 1331 and other Reconstruction legislation enforcing the

[28] The further question is posed whether the State defendants may in the same judicial proceeding on one day acquiesce in relief which has precisely the same effect on the State treasury as relief which they choose to oppose the next. *See* notes 7, 11, and 23, *supra*. Or does such conduct mean that the State Board of Education has, "in effect consented to the abrogation of [any eleventh amendment] immunity" for this case? *Edelman*, 415 U.S. at 672.

fourteenth amendment. We believe that cases such as *Ex parte Virginia*, *Ex parte Young*, and *Fitzpatrick* v. *Bitzer*, implicitly recognize that these historic changes fundamentally restructured the Constitutional Union so as to authorize suits directly against the States and their officers, thereby abrogating their immunity from direct money judgments in cases of *de jure* racial discrimination. For, as the Court recognized in *Fitzpatrick* v. *Bitzer*, not only does exercise of the section 5 enforcement power "necessarily" limit the "principle of State sovereignty" found in *Hans* v. *Louisiana*, but "the other sections by their own terms embody limitations on State authority." 49 L.Ed.2d at 622. We also believe that the framers of the Civil War Amendments and the Reconstruction legislation, as well as the States themselves, either intended or accepted this complete limitation of State sovereignty within the reach of the fourteenth amendment. Our reasoning in support of these beliefs is outlined in Appendix A attached to this brief.[29]

We recognize, however, that this Court has never previously resolved these constitutional issues and on many occasions has expressly refrained from doing so. *E.g.*, *Ex parte Young*, 209 U.S. at 150; *Edelman* v. *Jordan*, 415 U.S. at 694 n.2 (Marshall, J., dissenting); *National League of Cities* v. *Usery*, 49 L.Ed.2d at 258 n.17; and *Mt. Healthy City School District* v. *Doyle*, 45 U.S.L.W. at 4080-81. *See also*, *Fitzpatrick* v. *Bitzer*, *supra*. There is no need to resolve these fundamental constitutional and jurisdictional issues in this case if the Court finds the alternative grounds set forth in Arguments III A and III B, *supra*, pp. 34-42, sufficient to affirm the judg-

[29] These views may also call into question the continuing vitality of *Hans* v. *Louisiana*, 134 U.S. 1 (1890), a decision which we believe fundamentally misconstrued Justice Iredell's dissent in *Chisolm* v. *Georgia*, and, therefore, the purpose and effect of the eleventh amendment. *Cf. Fitzpatrick* v. *Bitzer*, 49 L.Ed.2d at 622, 623 n.2 (concurring opinions of Brennan, J., and Stevens, J.).

ment of the court below. But if the Court finds these alternative grounds alone or in combination inadequate, then the Court cannot dispose of this case on the State Petitioners' claim of sovereign immunity without reaching the unresolved constitutional and jurisdictional issues.

Although Appendix A outlines the argument on these issues, the parties and the court below never focused on them. We therefore believe that the prior practice of this Court counsels either a remand to the Court of Appeals for its initial consideration of these issues, *Dandridge* v. *Williams*, *supra*, 397 U.S. at 475-76 n.6, or full rebriefing and argument on these historic issues as in *Brown*. These unresolved issues are too important, and for too long have been expressly avoided, to permit their summary resolution.

IV.

IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE THE LOWER COURTS DID NOT ABUSE THEIR EQUITABLE DISCRETION IN ORDERING THE STATE DEFENDANTS TO IMPLEMENT ANCILLARY RELIEF JOINTLY WITH THE LOCAL DEFENDANTS.

In this section of Argument we assume for purposes of analysis that ancillary relief is appropriate (Argument I), that the lower courts had the power to compel State defendants to participate in implementing such ancillary relief (Argument II), and that the eleventh amendment does not immunize State defendants from sharing in the cost burdens of such implementation (Argument III). In sum, we assume the *constitutional power* of the courts below to order the relief here challenged by State Petitioners. In this part we consider whether, in the particular circumstances of this case, there are nonconstitutional factors which so limit or guide the exercise of equitable discretion as to require reversal or modification of the injunction at issue.[30] We believe that a review of the record will show that the injunction here at issue does not exceed equitable limitations and is tailored to fit state practice and local circumstances.

First, State and local defendants acted jointly and severally to commit long-standing and pervasive violations of plaintiffs' constitutional right to a racially nondiscriminatory system of schooling. It is therefore appropriate not only to provide adequate relief from the violation to plaintiffs; *prima facie*, it is also proper to shape the injunctive decree so that both wrongdoers share in the burden of implementing relief, including any costs. *Cf.* W. PROSSER, LAW OF TORTS § 52 at 314-16 (4th ed. 1971).

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[30] Although State Petitioners may not have briefed these nonconstitutional, equitable considerations, we recognize that such issues are at least implicated in the questions on which this Court granted certiorari. *Cf.* Supreme Court Rule 23(1)(c). In any event, it is appropriate for this Court to determine whether there has been an abuse of equitable discretion here:

> That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. . . . [W]hat is required is the principled application of standards consistent with [the] purposes [of the right at stake] and not equity which varies like the Chancellor's foot.

Albermarle Paper Co. v. *Moody*, 422 U.S. 405, 416-17 (1975). As this Court has stated in another context, "the remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb* v. *Chavis*, 403 U.S. 124, 161 (1971); *Minnesota State Senate* v. *Reems*, 406 U.S. 187, 199 (1972). As put in *Swann*, although "a district court's equitable powers to remedy past wrongs is broad," 402 U.S. at 15, "it must be recognized that there are limits . . . as to how far a court may go." *Id.* at 28. Moreover, the equity court must inevitably be concerned with "adjusting or reconciling public and private needs . . . in shaping its remedies." *Brown II*, 349 U.S. at 299-300. And the relief should also be tailored "taking into account the practicalities of the local situation." *Davis* v. *Bd. of School Comm'rs*, 402 U.S. 33, 37 (1971).

Second, in shaping State and local defendants' joint participation in relief, the lower courts were solicitous of State policy and practice concerning the local administration of public schools, general supervision of education by State school authorities, and the joint allocation of costs for local school operations between federal, state, and local revenues. Thus, for example, the Court of Appeals modified the district court's initial order (PA 1a) requiring the State defendants to acquire buses in order to conform with State practice so that the Detroit Board would purchase, own, and operate the buses and the State defendants would reimburse the Detroit Board for 75% of the cost (PA 3a-5a). Pursuant to the practice of State-level supervision, the district court made the State defendants directly responsible for the operation and costs of services to monitor implementation of relief (PA 85a, 148a). And the relief hammered out between the State and local defendants with respect to magnet vocational centers followed federal, state, and local policy as a consequence of the district court's "encouragement" (PA 119a). There was *no* attempt by the courts below to restructure the traditional methods of administering, supervising, and financing public education in the Detroit School District under the guise of providing complete relief from the *de jure* segregation found. Thus, equitable considerations inhering in "principles of federalism" were followed in shaping relief. *Cf. Hills* v. *Gautreaux*, 425 U.S. 284, 293-300 (1976).

Finally, that portion of the decree requiring State and local defendants together to share in the cost burdens of implementing four aspects of ancillary relief causes the State defendants, and the Detroit Board, to bear no more than their fair share of the costs of remedying their wrongs. In fairly apportioning these costs, the decree expressly limits the State defendants' participation to the "excess costs" beyond any pre-existing local expenditure;

this insures that the State defendants' "fair share of the costs" will be limited to the actual costs of the ancillary relief ordered rather than inadvertently include payment for any other local programs or operations. (PA 146a-147a.) Such a decree constitutes no blank check to be drawn on the State treasury at will for educational operations generally or desegregation relief particularly.

In imposing on the State defendants a share of the costs of implementation, the decree also took into account somewhat the relative resources available to the State and local defendants. The gravamen of the proof on this "resource" issue was not that there was a State school financing violation as considered by this Court in *Rodriguez*. As plaintiffs have repeatedly made clear, this is a case of hard core racial discrimination, *de jure* school segregation, not a school finance case. But the record did amply demonstrate and both District Judges Roth and DeMascio made findings (*e.g.*, 338 F. Supp. at 589; PA 37a-41a, 58a), affirmed by the Court of Appeals (484 F.2d at 238-42; PA 179a-180a), that:

1. The Detroit School District has been on the verge of bankruptcy compared to the relatively dynamic State School Aid fund (whose warrants and checks are issued under the authority of State Petitioners, MSA 3.140(1), 15.1919 (517)).
2. The Detroit Board was not malingering in its effort to raise money and suffered from relatively severe limitations on its ability to raise additional money locally.
3. The State, by a series of specific actions (historic discrimination in the authority granted for school bonding, reimbursement of transportation costs, and computing state aid) "created and perpetuated systematic educational inequalities," 338 F. Supp. at 589, which further served to stigmatize plaintiffs' schooling as the state education system's undeserving, black stepchild.

The relevance of such findings for this Court's present review is not that they make out an independent constitutional violation (although they may very well). Rather, they are factors which the chancellor may properly consider in apportioning the cost burdens of remedy for other violations between two sets of wrongdoers over which he unquestionably has the constitutional power to order either wrongdoer alone to provide relief.

An alternative to requiring the State defendants to share in the burdens of implementing relief with the local defendants is to enjoin one of the two parties to bear the total burden of the ancillary relief. But that choice would, of course, allow one set of defendants to avoid sharing in the burdens of remedying its own violation contrary both to the nature of the violation and to the State policy of sharing the responsibility for public education in Michigan between local school districts and the State and its responsible State officials. The other alternative would be to require each set of defendants to implement alone separate aspects of ancillary relief; but that would require some departure from the State policy and practice of local administration of schools.

Given these circumstances, and the alternatives available, the judgment below neither exceeds the equitable authority nor constitutes an abuse of the equitable discretion vested in the courts below to injoin the State and local defendants to provide necessary prospective relief from the *de jure* segregation violation and its effects.

The Court of Appeals thoroughly reviewed the ancillary relief ordered as measured against the rights and interests at stake and the record evidence. *Cf. Brown II*, 349 U.S. at 299-301. In our view, the Court of Appeals properly held that there had been no abuse of discretion in the nature and kind of ancillary relief ordered to implement plaintiffs' right to attend a racially non-

discriminatory school district as free as possible of the present effects of the prior and continuing *de jure* discrimination. Thus, the Court of Appeals' judgment represents "the principled application of standards consistent" with the rights and interests at stake, even if some of the district court's other rulings and its mode of proceeding (*see* Statement, *supra*, pp. 12-13) resemble the "chancellor's foot." *Albemarle Paper Co.* v. *Moody*, *supra*, 402 U.S. at 417.[31]

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[31] The State defendants made no claim in the Court of Appeals of prejudice in the district judge's extraordinary method of proceeding (*see*, note 9 and page 13, *supra*) *ex parte* without transcription and thereby limiting the record on the details, total cost, and allocation of costs for ancillary relief. For that reason, the Court of Appeals was correct in affirming the judgment of the district court. Similarly, the State defendants make no claim of error or prejudice in this Court on these procedural grounds. *Cf.* State Petitioners' Brief at 11 n.7. That may be because the State defendants have a basis independent of the record for knowing that the actual costs previously assessed are directly related to ancillary relief appropriate under the standards described in this brief; this may be particularly true since the actual costs of implementing ancillary relief over the past year may be known to them. However, if State defendants do now challenge on some evidentiary basis the amount or the allocation of the costs assessed, remand pursuant to this Court's "plain error" rule, 40 (1)(d)(2), may be appropriate to insure that State defendants have the opportunity to contest and to make a record to insure that they bear only their fair share of the actual costs of implementing ancillary relief, pursuant to the controlling constitutional and equitable principles.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs and Respondents Ronald Bradley, et al., pray that the judgment of the Court of Appeals on ancillary relief be affirmed.

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Respectfully submitted,

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APPENDICES

APPENDIX A

OUTLINE OF ALTERNATIVE ARGUMENTS ON THE IMPACT OF THE FOURTEENTH AMENDMENT AND ENSUING RECONSTRUCTION LEGISLATION ON STATE SOVEREIGNTY.

Following, in outline form, are several arguments, alternative to Arguments III A and III B in the text of this brief, which also require rejection of the State Petitioners' sovereign immunity claims. In our view it is not necessary to reach these questions in this case because our other arguments are dispositive. Should the Court reject the sovereignty analyses presented in the main Arguments III A and B, however, it would then be necessary for the Court to consider the questions raised in Argument III C. In that circumstance, this outline will be in need of considerable fleshing out, and we have accordingly requested (*see* pp. 43-44, *supra*) the opportunity for full-fledged rebriefing or remand to the Court of Appeals for its initial consideration of these issues.

1. As a threshold matter, the reach of the eleventh amendment does not extend to federal-question claims against the states. The purpose of the eleventh amendment was to restore the original understanding of the "diversity" clause of Article III, as understood by Justice Iredell in his dissent in *Chisholm* v. *Georgia*, 2 U.S. 419 (1793), and not to withdraw federal judicial power over federal-question claims against the states. The contrary interpretation arrived at in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), is mistaken. Hence, wherever Congress has, in the exercise of its Article III prerogatives, conferred federal-court jurisdiction over federal-question disputes, the states are subject to suit for a full measure of relief unless the jurisdictional grant provides otherwise. (These points are persuasively made in the

Brief *Amici Curiae* for the Lawyers' Committee for Civil Rights Under Law, et al., filed last Term in No. 75-251, *Fitzpatrick* v. *Bitzer*.)

Here the district court's jurisdiction was initially invoked pursuant to 28 U.S.C. §§ 1343 and 1331, among other provisions, and the existence of subject-matter jurisdiction with respect to plaintiffs' fourteenth amendment claims has never been in dispute. The eleventh amendment is therefore inapplicable to this case.

2. Even if point 1 is in error in asserting the general proposition that *all* federal-question claims against the states are not within the purview of the eleventh amendment, it is nevertheless correct insofar as the proposition pertains to federal-question claims arising under the fourteenth amendment. By their very terms, "the substantive provisions of the Fourteenth Amendment . . . themselves embody significant limitations on state authority." *Fitzpatrick* v. *Bitzer*, 49 L.Ed.2d 614, 621 (1976); *see also Ex parte Virginia*, 100 U.S. 339, 345-48 (1880). Moreover, the fourteenth amendment "is undoubtedly self-executing without any ancillary legislation so far as its terms are applicable to any existing set of circumstances." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *accord*, *Monroe* v. *Pape*, 365 U.S. 167, 198 (1961) (Harlan, J., concurring); B. SCHWARTZ, 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 215 (1970). "[T]he Fourteenth Amendment plainly prohibits a State itself from discriminating because of race." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 169 (1970).

Thus, of its own force the supervening fourteenth amendment circumscribes the reach of the eleventh. If there is subject-matter jurisdiction in the federal courts, as there is in this case, therefore, the violation of vested fourteenth amendment rights may be fully remedied without regard to the subordinate provisions of the eleventh amendment.

3. In *Fitzpatrick* v. *Bitzer*, *supra*, this Court held that Congress had the power, conferred by § 5 of the fourteenth amendment, to enact enforcing legislation overriding the eleventh amendment immunity of the states. The Court plainly did not (and did not need to) reach the question, discussed in point 2, *supra*, as to whether the fourteenth amendment by its own terms limits the scope of immunity afforded by the eleventh amendment. Yet some lower federal courts have construed *Fitzpatrick* as requiring the existence of congressional action pursuant to § 5 as a precondition to the express terms of the fourteenth amendment being allowed to carry the day against a claim of eleventh amendment immunity. *See, e.g.*, *Jagnandan* v. *Giles*, 538 F.2d 1166 (5th Cir. 1976), *petition for cert. pending*, No. 76-832. We do not agree to that proposition, for reasons outlined in point 2, above. But even if the proposition is correct, such § 5 congressional authorization is manifestly present in the instant case.

In addition to the Equal Educational Opportunities Act of 1974 (discussed in the main text at pp. 38-41), such authorization is present in § 1 of the Civil Rights (or Ku Klux) Act of April 20, 1871, 17 Stat. 13 (now codified as 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983), and in the Judiciary Act of March 3, 1875, 18 Stat. 470 (now 28 U.S.C. § 1331), conferring general federal-question subject-matter jurisdiction on the federal courts limited only by a minimum jurisdictional-amount requirement. We shall outline these two latter points *seriatim*.

a. Section 1 of the Civil Rights Act of 1871 plainly constitutes legislation under § 5 of the fourteenth amendment to enforce the substantive provisions thereof. The

title of the Act so states (17 Stat. 13), and this Court has recognized that the Act "was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961). The cause-of-action part of the 1871 Act (now 42 U.S.C. § 1983) subjects "[e]very person who, under color of" state law deprives another of fourteenth amendment rights, for example, to liability "in an action at law, suit in equity, or other proper proceeding for redress." And the jurisdictional part (28 U.S.C. § 1343 (3)) confers jurisdiction on the federal courts co-extensive with the authorized cause of action. *See Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974). Whoever may come within the ultimate coverage of this Act (*cf. Adickes* v. *S. H. Kress & Co.*, *supra*), it is clear that "state officials" (*id.* at 167 and 168) are a primary target.

This would be enough to demonstrate that the state officials who are petitioners here have been subjected to suit under § 5 legislation, and thereby stripped of their eleventh amendment immunity in this case, were it not for the following *dictum* in *Fitzpatrick* v. *Bitzer*, *supra*, 49 L.Ed.2d at 619 (emphasis added):

> We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe* v. *Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; *that being the case, it could not have been intended to include States as parties defendant.*

If the italicized portion of this quotation is construed to mean that state officials, acting in their official capacities (the situation in *Edelman*), are not subject to

suit for a full measure of relief under § 1983, then we respectfully submit that the *dictum* is wrong.

We recognize the possible need for reconsideration of *Edelman's* treatment (415 U.S. at 674-75) of § 1983 in light of *Fitzpatrick*, but the answer to this dilemma is not found in the *Monroe* v. *Pape* holding that municipalities are not suable "persons" under § 1983.* Whether or not *Monroe's* holding in that respect is correct (and it has been much criticized), it simply cannot be extended to state-level officials. The determination that cities and counties are not § 1983 persons was based on *Monroe's* analysis (365 U.S. at 187-92) of the circumstances surrounding rejection by the Forty-Second Congress of an amendment (and a subsequent revised version) to the 1871 Act proposed by Senator Sherman of Ohio. He proposed to impose liability upon any "county, city or parish" for property damages and personal injuries caused by "any persons riotously and tumultously assembled together" (*id.* at 188 nn. 38 and 41) even if neither the county, city, or parish nor its em-

* The *Fitzpatrick* explanation for *Edelman's* handling of § 1983 is made more difficult to comprehend by reason of the Court's own treatment of the § 1983 "person" problem as a mandatory jurisdictional inquiry. *Mt. Healthy City School District* v. *Doyle*, 45 U.S.L.W. 4079, 4080-81 (U.S. Jan. 11, 1977); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). If the basis of the decision in *Edelman* was truly a determination that the suit against the official-capacity state officials was in fact a suit against the state which "could not have been intended" by § 1983 to be a suable party (*Fitzpatrick*, 49 L.Ed.2d at 619), then the court was without jurisdiction to render its decision on the eleventh amendment and should have vacated and remanded as in *City of Kenosha* v. *Bruno*, *supra*. (In our view, however, assertions of "non-personhood," which require interpretation of the cause-of-action provision (§ 1983) rather than the jurisdictional grant (§ 1343(3)), ought to be treated as waivable affirmative defenses, not as defects in subject-matter jurisdiction, *cf. Bell* v. *Hood*, 327 U.S. 678 (1946); or, at most, the problem should be treated as a limitation on jurisdiction over the person, which is also waived if not raised in the trial court, *cf.* Rule 12(h)(1), FED. R. CIV. P.).

ployees were in any way responsible for the damages and injuries caused by such persons.

The circumstances surrounding rejection of the Sherman amendment are *sui generis*; and we do not believe that a full review of the 1871 Act's legislative history will provide any support for the proposition that a state official, acting in his official capacity as the state (i.e., when "he acts in the name and for the State, and is clothed with the State's power, his act is that of the State," *Ex parte Virginia*, *supra*, 100 U.S. at 347), is exempt from § 1983's coverage. Indeed, as the principal issue resolved in *Monroe* (365 U.S. at 171-88; *see also id.* at 192-202 (Harlan, J., concurring)) demonstrates, § 1983 applies to all officers of the state, whether they are acting in their individual or in their official capacities; and Justice Frankfurter was of the dissenting view (*id.* at 202-59) that the statute applied *only* to the latter category of officials.

A better and more supportable rationalization for the apparent tension between *Edelman* and *Fitzpatrick*, we would therefore suggest, is that the § 1983 cause of action in *Edelman* was for a violation of the Social Security Act, which the Court concluded did not constitute a diminution of the state's eleventh amendment immunity, whereas the cause of action in *Fitzpatrick* (Title VII), like the § 1983 claim in the instant case, was predicated on the fourteenth amendment, which itself embodies limitations on state authority.*

b. Finally, if § 1983 fails the test of § 5 enforcement legislation by being construed as inapplicable to

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* Although more supportable, even this explanation may not be justified if, for example, Congress has the power under § 5 of the fourteenth amendment to vindicate the Social Security Act in the federal courts *via* § 1983. *See Blue* v. *Craig*, *supra*. In that event, *Fitzpatrick* would require full reconsideration of *Edelman*, in an appropriate case.

persons like state officials, the federal-question jurisdictional statute most surely passes. 28 U.S.C. § 1331 is not encumbered with a "person" limitation. Subject only to the jurisdictional-amount requirement (which is not in dispute here, *cf. Mt. Healthy City School District* v. *Doyle*, 45 U.S.L.W. 4079 (U.S. Jan. 11, 1977)), the statute confers judicial power to decide fourteenth amendment claims such as those presented in this case, where the existence and validity of plaintiffs' fourteenth amendment cause of action is not contested. *Cf. Mt. Healthy City School Dist.*, *supra*. Section 1331 was passed in 1875 and "was, like the Act of 1871, an expansion of national authority over matters that, before the Civil War, had been left to the States." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 548 (1972). It "has been regarded as the 'culmination of a movement . . . to strengthen the Federal Government against the states'" (*id.* at 548 n.14); as "'clearly . . . part of rather than an exception to, the trend of [Reconstruction] Legislation which preceded it.'" *Id.* at 548. *See also Steffel* v. *Thompson*, 415 U.S. 452, 463-64 (1974); *District of Columbia* v. *Carter*, 409 U.S. 418 (1973); *Mitchum* v. *Foster*, 408 U.S. 225 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 246-47 (1967). Section 1331 was thus the final part of the Reconstruction package designed to place the protection of individual federal rights guaranteed by the fourteenth amendment, *inter alia*, in the hands of the federal judiciary. Since a grant of jurisdiction "is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws" (*Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); *see also Civil Rights Cases*, *supra*, 109 U.S. at 12), § 1331 clearly embodies any necessary congressional authorization under § 5 of the fourteenth amendment. *Cf. Usery* v. *Allegheny County Institution Dist.*, No.

76-1079 (3d Cir. Oct. 28, 1976). Especially is this so in connection with claims arising under the fourteenth amendment, which, to the extent of its terms, is self-executing (*see* point 2, *supra*).

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitutional Provisions

Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are re-reserved to the States respectively, or to the people.

Amendment 11:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 14:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutory Provisions

20 U.S.C. § 1601. Congressional findings and purpose

(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving

the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

(b) The purpose of this chapter is to provide financial assistance—

(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and

(3) to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. § 1606. Authorized activities—Programs and projects

(a) Financial assistance under this chapter (except as provided by sections 1607, 1608, and 1610 of this title) shall be available for programs and projects which would not otherwise be funded and which involve activities designed to carry out the purpose of this chapter stated in section 1610(b) of this title:

SPECIAL REMEDIAL SERVICES

(1) Remedial services, beyond those provided under the regular school program conducted by the local educational agency, including student to student tutoring, to meet the special needs of children (including gifted and talented children) in schools which are affected by a plan or activity described in section 1605 of this title or a program described in section 1607 of this title, when such services are

deemed necessary to the success of such plan, activity, or program.

PROFESSIONAL STAFF

(2) The provision of additional professional or other staff members (including staff members specially trained in problems incident to desegregation or the elimination, reduction, or prevention of minority group isolation) and the training and retraining of staff for such schools.

TEACHER AIDES

(3) Recruiting, hiring, and training of teacher aides, provided that in recruiting teacher aides, preference shall be given to parents of children attending schools assisted under this chapter.

INSERVICE TEACHER TRAINING

(4) Inservice teacher training designed to enhance the success of schools assisted under this chapter through contracts with institutions of higher education, or other institutions, agencies, and organizations individually determined by the Assistant Secretary to have special competence for such purpose.

COUNSELING

(5) Comprehensive guidance, counseling, and other personal services for such children.

NEW CURRICULA; MINORITY LANGUAGE

(6) The development and use of new curricula and instructional methods, practices, and techniques (and the acquisition of instructional materials relating thereto) to support a program of instruction

for children from all racial, ethnic, and economic backgrounds, including instruction in the language and cultural heritage of minority groups.

CAREER EDUCATION

(7) Educational programs using shared facilities for career education and other specialized activities.

INNOVATIVE INTERRACIAL PROGRAMS

(8) Innovative interracial educational programs or projects involving the joint participation of minority group children and other children attending different schools, including extracurricular activities and cooperative exchanges or other arrangements between schools within the same or different school districts.

COMMUNITY ACTIVITIES

(9) Community activities, including public information efforts, in support of a plan, program, project, or activity described in this chapter.

ADMINISTRATIVE SERVICES

(10) Administrative and auxiliary services to facilitate the success of the program, project, or activity.

PLANNING AND EVALUATION

(11) Planning programs, projects, or activities under this chapter, the evaluation of such programs, projects, or activities, and dissemination of information with respect to such programs, projects, or activities.

FACILITY REMODELING; MOBILE UNITS

(12) Repair or minor remodeling or alteration of existing school facilities (including the acquisition, installation, modernization, or replacement of instructional equipment) and the lease or purchase of mobile classroom units or other mobile education facilities.

20 U.S.C. § 1702:

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

20 U.S.C. § 1703:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

* * * *

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1706:

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

20 U.S.C. § 1708:

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 1706 of this title.

20 U.S.C. § 1720:

For the purposes of this subchapter—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 881(k) of this title.

28 U.S.C. § 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000c-2:

The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, including making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel

of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

42 U.S.C. § 2000c-4:

(a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of—

(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and

(2) employing specialists to advise in problems incident to desegregation.

(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

Regulatory Provisions

45 C.F.R. § 180.12:

Funds made available pursuant to this subpart shall be used for the activities described in paragraph (a) of this section and for one or more of the activities described in paragraphs (b) through (i) of this section, when such activities are requested in accordance with § 180.11(a).

(a) Planning and other activities designed to insure that administrators, teachers, and other educational personnel are not demoted or dismissed on the basis of race, color, religion, sex or national origin in the process of, or as a result of, desegregation;

(b) Assessment of desegregation-related educational needs in one or more public schools;

(c) Development of administrative methods and techniques to cope with special educational problems occasioned by desegregation;

(d) Development of educational programs, materials, and methods for use in desegregated classroom situations;

(e) Training of administrators, teachers, or other public school personnel in the implementation or use of methods, techniques, programs, and materials designed to cope with special educational problems occasioned by desegregation;

(f) Development of techniques for communications or interaction betwen public schools or school systems and the groups affected by the desegregation of such schools or school systems;

(g) Technical assistance to public school administrative staffs in determining the availability and appropriate utilization of funds under other Federal and State programs which would assist in coping with special educational problems occasioned by desegregation;

(h) Training of administrative staffs (in school districts which are required to desegregate their schools pursuant to a final order of a court of the United States, a State court, or a State agency or official or pursuant to a plan or assurance required by the Secretary) in efficient and educationally sound methods of assigning students to and within public schools;

(i) Any other activity which the Commissioner determines will make substantial progress toward achieving the purposes of this subpart.

45 C.F.R. § 180.31:

Any institution of higher education may apply for a grant pursuant to this subpart for the operation of short term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel (including school board members or trustees) to deal effectively with special educational problems occasioned by desegregation. An institute may focus only on desegregation on the basis of race, color, religion, or national origin, only on desegreation on the basis of sex, or on both of these types of desegregation.

45 C.F.R. § 180.41:

Any school board may make application pursuant to this subpart for a grant to pay, in whole or in part, the cost of employing a specialist to advise in problems incident to desegregation, and of giving to teachers and other public school personnel inservice training in dealing with problems incident to desegregation. An application may focus only on desegregation on the basis of race, color, religion, or national origin, only on desegregation on the basis of sex, or on both of these types of desegregation.

45 C.F.R. § 185.01:

Programs, projects, or activities assisted under the Act shall be for the purpose of achieving one or more of the following objectives:

(a) Meeting the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

(b) Eliminating, reducing, or preventing minority group isolation in elementary and secondary schools with substantial proportions of minority group students;

(c) Aiding school children in overcoming the educational disadvantages of minority group isolation.

45 C.F.R. § 185.12:

(a) The following activities are authorized to be carried out with financial assistance made available under this subpart when such activities would not otherwise be funded and are designed to carry out the purposes described in § 185.01. Such activities shall be directly related to, and necessary to, the implementation of a plan or project described in § 185.11:

(1) Remedial services, beyond those provided under the regular school program conducted by the local educational agency, including student to student tutoring, to meet the special needs of children (including gifted and talented children) in schools which are affected by a plan or project described in § 185.11, when such services are deemed necessary to the success of such plan or project:

(2) The provision of additional professional or other staff members (including staff members specially trained in problems incident to desegregation or the elimination, reduction, or prevention of minority group isolation) and the training and retraining of staff for such schools;

(3) Recruiting, hiring, and training of teacher aides;

(4) Inservice teacher training designed to enhance the success of schools assisted under the Act through contracts with institutions of higher education, or other institutions, agencies, and organizations individually determined by the Assistant Secretary to have special competence for such purpose;

(5) Comprehensive guidance, counseling, and other personal services for children in schools affected by a plan or project described in § 185.11;

(6) The development and use of new curricula and instructional methods, practices, and techniques (and the

acquisition of instructional materials relating thereto) to support a program of instruction for children from all racial, ethnic, and economic backgrounds, including instruction in the language and cultural heritage of minority groups;

(7) Educational programs using shared facilities for career education and other specialized activities;

(8) Innovative interracial educational programs or projects involving the joint participation of minority group children and other children attending different schools, including extracurricular activities and cooperative exchanges or other arrangements between schools within the same or different school districts;

(9) Community activities, including public information efforts in support of a plan, program, project, or activity described in the Act;

(10) Administrative and auxiliary services to facilitate the success of the program, project, or activity assisted under this subpart;

(11) Planning programs, projects, or activities assisted under this subpart, the evaluation of such programs, projects, or activities, and dissemination of information with respect to such programs, projects, or activities;

(12) Repair or minor remodeling, or alteration of existing school facilities (including the acquisition, installation, modernization, or replacement of instructional equipment) and the lease or purchase of mobile classroom units or other mobile education facilities.

(Public Law 92-318, sections 702(b), 707(a))

(b) The activities authorized under paragraphs (a)(10) and (11) of this section shall be assisted only as part of, and in conjunction with, a comprehensive educational program, project, or activity designed to carry out the purposes described in § 185.01.

(Public Law 92-318, sections 702(b), 707(a))

(c) Applications by local educational agencies for assistance under this subpart shall include an assurance that in the case of a proposed program or project which includes activities authorized under paragraph (a)(3) of this section, preference in recruiting and hiring teacher aides shall be given to parents of children attending schools assisted under the Act.

(Public Law 92-318, section 707(a)(3))

(d) The term "repair or minor remodeling or alteration," for purposes of paragraph (a)(12) of this section, means the making over or remaking, in a previously complete building or facility, of space used or to be used for activities otherwise authorized by this section, where such making over or remaking is necessary for effective use of such space for such purpose and where no other space is available for such use. The term does not include building construction, structural alterations to buildings, building maintenance, or general or large-scale renovation of existing buildings or facilities. In no case may more than 10 percent of the amount made available to the applicant under this subpart be used for activities authorized under paragraph (a)(12) of this section.

(Public Law 92-318, section 707(a)(12))